No. 91-571-CFX
Status: GRANTED

Title: Robert J. Taylor, Trustee, Petitioner
v.
Freeland & Kronz, Wendell G. Freeland and Richard F. Kronz

Docketed:
October 7, 1991

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Dyk,Timothy B.

Counsel for respondent: Simon,Kenneth P.

NOTE: Due 100691-SUN 100891 ck rec'd

Entry	Date	Note	Proceedings and Orders
1	Oct 7 1991	G	Petition for writ of certiorari filed.
2	Nov 4 1991		Brief of respondent Freeland & Kronz, et al. in opposition filed.
3	Nov 6 1991		DISTRIBUTED. November 27, 1991
4	Nov 18 1991	X	Reply brief of petitioner Robert Taylor filed.
5	Nov 27 1991		Petition GRANTED.
			**********
6	Jan 2 1992		SET FOR ARGUMENT MONDAY, MARCH 2, 1992. (1ST CASE)
7	Jan 13 1992		Joint appendix filed.
8	Jan 13 1992		Brief of petitioner Robert Taylor filed.
9	Jan 24 1992		CIRCULATED.
10	Jan 31 1992		Record filed.
		*	Certified record, briefs and partial proceedings U. S. Court of Appeals, Third Circuit.
11	Feb 7 1992		Record filed.
		*	Original proceedings U.S. District Court, Western District of Pennsylvania (1 Box)
13	Feb 12 1992	X	Brief amici curiae of Mon Valley Unemployed Committee, et al. filed.
12	Feb 13 1992	X	Brief of respondents Freeland & Kronz, et al. filed.
14	Feb 24 1992	X	Reply brief of petitioner Robert Taylor filed.
15	Mar 2 1992		ARGUED.

(1)

No. 91-571

Supreme Court, U.S.
FILED
OCT 7 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT J. TAYLOR, Trustee,

Petitioner,

v.

FREELAND & KRONZ, a Partnership; WENDELL G. FREELAND; and RICHARD F. KRONZ,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

GARY W. SHORT
Suite 2317, Koppers Building
Grant Street & Seventh Avenue
Pittsburgh, Pennsylvania 15219
(412) 765-0100

TIMOTHY B. DYK
(Counsel of Record)
PATRICK J. POTTER
STEPHEN J. GOODMAN
DARRYL R. MARSCH
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939
PETER M. LIEB
JONES, DAY, REAVIS & POGUE
599 Lexington Avenue
New York, New York 10022
(212) 326-3939
Counsel for Petitioner

QUESTION PRESENTED

Whether, under Section 522(*l*) of the Bankruptcy Code, a bankruptcy court must exempt property from the bankruptcy estate, even though the debtor had no colorable basis for claiming the exemption, because no one objected to the claimed exemption within the period set forth in Bankruptcy Rule 4003(b).

PARTIES TO THE PROCEEDING

The parties to the proceedings in the court below were: Robert J. Taylor, as Trustee in the bankruptcy proceeding of Emily Davis; Freeland & Kronz, a partnership; Wendell G. Freeland; and Richard F. Kronz.

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S. Rep. No. 95-989, 95th Cong., 2nd Sess., *reprinted in*, 1978 U.S. Code Cong. & Admin. News 5787 19

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. _____

ROBERT J. TAYLOR, Trustee,

Petitioner,

v.

FREELAND & KRONZ, a Partnership;
WENDELL G. FREELAND; and
RICHARD F. KRONZ,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

Robert J. Taylor, Trustee, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App. 1a) is reported at 938 F.2d 420. The memorandum opinion of the United States District Court for the Western District of Pennsylvania (App. 18a) is reported at 118 Bankr. 272; its order affirming the judgment of the bankruptcy court is unreported (App. 16a). The memorandum opinion of the United States Bankruptcy Court for the Western District of Pennsylvania (App. 30a) is reported at 105 Bankr. 288; its judgment (App. 28a) is reported at 105 Bankr. 294.

JURISDICTION

The court of appeals entered its judgment on July 8, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)(1988).

STATUTES AND RULES INVOLVED

Section 522 of the Bankruptcy Code, 11 U.S.C. § 522 (1988), provides in pertinent part:

> (b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules, one debtor may not elect to exempt property listed in paragraph (1) and the

other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is --

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) Any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

* * *

(d) The following property may be exempted under subsection (b)(1) of this section:

(1) The debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $1,200 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $200 in value in any particular item or $4,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $500 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value $400 plus up to $3,750 of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $4,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive --

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veteran's benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless --

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

(11) The debtor's right to receive, or property that is traceable to --

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed $7,500, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the

extent reasonably necessary for the support of the debtor and any dependent of the debtor.

* * *

(*l*) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt. . . .

Rule 4003(b), Federal Rules of Bankruptcy Procedure, provides in pertinent part:

(a) Claim of Exemptions. A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. If the debtor fails to claim exemptions or file the schedule within the time specified in Rule 1007, a dependent of the debtor may file the list within 30 days thereafter.

(b) Objections to Claim of Exemptions. The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court. Copies of the objections shall be

> delivered or mailed to the trustee and to the person filing the list and the attorney for such person.[1]
>
> (c) Burden of Proof. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections. . . .

Rule 9011, Federal Rules of Bankruptcy Procedure, provides in pertinent part:

> (a) Signature. Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

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[1] The phrase "or supplemental schedules" was added to subsection (b) by the 1991 amendments to the Bankruptcy Rules, effective August 1, 1991.

> and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee. . . .

STATEMENT

This case presents the question of whether, under Section 522(*l*) of the Bankruptcy Code, 11 U.S.C. § 522(*l*), a debtor may obtain an exemption for certain property, even though there was absolutely no legal basis for claiming such an exemption, because no one filed a formal objection to the claimed exemption within the period set forth in Bankruptcy Rule 4003(b).

Emily Davis ("Davis") filed a voluntary petition under Chapter 7 of the Bankruptcy Code on October 24, 1984 (Appendix filed with Third Circuit, hereinafter referred to as "Record on Appeal" ("ROA"), at 40a). At the time of the filing, she was pursuing a lawsuit against Trans World Airlines, Inc. ("TWA") for employment discrimination, in which TWA had been found liable for wrongfully denying her a promotion (ROA 101-27). TWA had appealed the order finding liability to the

Pennsylvania Supreme Court, and, on the date that Davis filed her bankruptcy petition, was still awaiting the Supreme Court's decision (ROA 128-29). The TWA appeal ultimately proved to be unsuccessful (ROA 128-29, 141). Damages were to be determined after further proceedings (ROA 101).

Section 522(b) of the Bankruptcy Code, 11 U.S.C. § 522(b), provides that "an individual debtor may exempt from property of the estate" either the types of property listed in 11 U.S.C. § 522(d) or, in the alternative, property which is exempt under other legal provisions (including state and local law). The procedure for claiming these exemptions is set forth in 11 U.S.C. § 522(*l*), which requires the debtor (or a dependent of the debtor) to "file a list of property that the debtor claims as exempt under" 11 U.S.C. § 522(b). Under Bankruptcy Rule 4003(b), "[t]he trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to [Bankruptcy] Rule 2003(a). . . ." The bankruptcy court then determines whether the claimed exemptions are valid, and if they are, the property at issue is removed from the bankruptcy estate.

On the schedules which she filed with her bankruptcy petition on October 24, Davis claimed an exemption, under 11 U.S.C. §§ 522(b) and (d), for:

> Proceeds from lawsuit - Winn v. TWA
> Claim for lost wages

(ROA 59). On the portion of the form in which she was to state the "value" of those proceeds, she indicated that the value was "unknown." *Id.*

On November 26, 1984, Petitioner Robert Taylor ("Taylor") was appointed trustee in the bankruptcy proceeding (ROA 41). On January 4, 1985, he conducted the meeting of the creditors held pursuant to Bankruptcy Rule 2003(a) and was advised by either Davis or her bankruptcy counsel that Davis could recover as much as $90,000 from the TWA lawsuit (ROA 40a, 70).

Neither Taylor nor any of the creditors filed any objections, within the 30-day period specified by Rule 4003(b), to the exemptions claimed by Davis. Although Taylor considered the proceeds from the TWA lawsuit (less "costs and attorney fees") to be the property of the estate, he wanted to find out, before making any objections to the claimed exemptions, how much money (if any) Davis would actually recover from that lawsuit (ROA 227, 230, 234-35). Accordingly, in a letter of January 7, 1985 to Respondents Wendell G. Freeland ("Freeland") and Richard F. Kronz ("Kronz"), Taylor advised them of his position that "the net proceeds of said suit would be an asset in the bankruptcy estate" and asked about the status of the litigation (ROA 73). In a letter dated January 9, 1985, an associate of Freeland & Kronz responded by informing Taylor that the Pennsylvania Supreme Court had ruled in Davis' favor and that Freeland & Kronz had calculated the damages (which had not yet been judicially determined) at $110,000 (ROA 74).

Davis was discharged from bankruptcy on October 16, 1985, but the case was not closed (ROA 40a, 41). On September 11, 1987, Davis executed a settlement agreement with TWA under which TWA was to pay her and her attorneys approximately $110,000, including $23,483.75 (less applicable withholding taxes) "as and for

back pay or front pay," $23,483.75 "as and for all alleged tort claims or any other claims not represented [sic] asserted wage losses," and $63,032.50 "as and for attorney's fees and expenses. . . ." (ROA 81-92). Neither Davis nor her attorneys informed Taylor of the settlement until May of 1988, after Taylor had written to Freeland & Kronz requesting information on the status of the lawsuit (ROA 48, 75).

In October, 1988, Taylor filed a complaint against Davis, Freeland & Kronz, Freeland, and Kronz seeking to recover for the bankruptcy estate $79,016.25 which had been paid as part of the TWA settlement (ROA 8-17). The bankruptcy court ordered that the defendants return to Taylor the $23,483.75 paid as recovery for tort claims, on the grounds that there was "no statutory basis" under 11 U.S.C. § 522(d) for exempting a tort recovery (App. 29a, 41a).[2] It rejected, on the grounds of judicial estoppel, the defendants' assertion that the sum in question actually represented lost wages, but had been described as being for tort claims in order to avoid paying taxes on it (App. 41a). It also held that while neither Taylor nor any of the creditors had filed an objection to the claimed exemption within the period specified by Bankruptcy Rule 4003(b) (within 30 days after the meeting of creditors), Section 522(*l*) implicitly requires that "there be a statutory basis for the claimed exemption before the failure of any party in interest to timely object

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[2] The bankruptcy court concluded that requiring the defendants to return $23,483.75 would "produce a res sufficient to pay all of Debtor's [Davis'] creditors" and that it was therefore "not necessary . . . to determine" whether there was any statutory basis under Section 522(d) for exempting the remaining portions of the TWA settlement (App. 42a).

to it has any legal effect" (App. 38a). The bankruptcy court reasoned that Section 522(*l*) incorporates by reference the provisions of Section 522(b), which limits exemptions to those available under federal, state, or local law, and that "[i]f Debtor may select in any manner her exemptions, then no purpose is served by the inclusion of" Section 522(b) (*id.*). The bankruptcy court also noted that permitting "exemption by declaration" would "encourage certain debtors of questionable integrity to claim *all* of their property as exempt," in the hope that the trustee would fail to object, and that "constant litigation, if not outright chaos, would result" (App. 39a) (emphasis in original). It concluded that "this surely would not be the congressional intent" (*id.*).

The district court affirmed the bankruptcy court's decision, agreeing both that (1) permitting exemptions for which there was no "statutory basis" would render Section 522(b) "nugatory" and (2) permitting "exemption by declaration" would hinder "the orderly administration of the debtor's estate" (App. 23a).

The Third Circuit, however, reversed, and held that the failure of the trustee (or any other party in interest) to file an objection to the claimed exemption within the period specified by Bankruptcy Rule 4003(b) meant that the proceeds of the TWA settlement were exempt under Section 522(*l*). (App. 15a). The court of appeals acknowledged that "[c]ourts have taken three different approaches to" the interpretation of Section 522(*l*): (1) that an exemption must be allowed if a timely objection is not filed; (2) that exemptions which are invalid under Section 522(b) should not be allowed, regardless of whether a timely objection was filed; and (3) that if a timely objection is not filed, courts are not to fully

examine the validity of the exemption, but must still deny the exemption if there was no "good-faith statutory basis" for claiming it (App. 7a-8a). The court of appeals, while adopting the first of those three approaches, also acknowledged that both the Eighth Circuit, in *Halverson v. Peterson (In re Peterson)*, 920 F.2d 1389 (8th Cir. 1990) and the Sixth Circuit, in *Munoz v. Dembs* (*In re Dembs*), 757 F.2d 777 (6th Cir. 1985), have adopted the third approach (App. 8a).

In reaching its result, the Third Circuit reasoned that (1) the text of Section 522(*l*) and Bankruptcy Rule 4003(b) "admits of no exceptions to the bright-line procedural rule," (2) that "[n]othing in the legislative materials suggests that any exceptions to this bright-line rule were intended," (3) that "the evolution of the bankruptcy laws suggests that Congress intended to shift the burden of objection from the debtor to the other parties in interest", and (4) that, as a matter of policy, "[t]he time limits and obligations established by section 522(*l*) and Rule 4003(b) serve the dual purposes of finality and certainty." (App. 11a-12a). It also argued that Bankruptcy Rule 9011 "authorizes sanctions" for bad-faith exemption claims and "should act as the primary deterrent" against such claims. (App. 14a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS CONSTRUING SECTION 522(*l*) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 4003(b)

The court below recognized that its decision stands in direct conflict with the Eighth Circuit's decision in *Halverson v. Peterson (In re Peterson)*, 920 F.2d 1389 (8th Cir. 1990) and the Sixth Circuit's decision in *Munoz v. Dembs* (*In re Dembs*), 757 F.2d 777 (6th Cir. 1985) (App. 8a-9a) ("We respectfully disagree with the conclusion reached by the courts below and by the Courts of Appeals for the Sixth and Eighth Circuits."). *See also Sherk v. Texas Bankers Life & Loan Ins. Co.* (*In re Sherk*), 918 F.2d 1170, 1174 (5th Cir. 1990) (agreeing with *Peterson* and *Dembs*). In *Peterson*, the Eighth Circuit noted that Section 522(*l*) of the Bankruptcy Code and Bankruptcy Rule 4003(b) require trustees to object to claimed exemptions within thirty days after the creditor's meeting or any amendment of the schedules, but the court also concluded that wooden enforcement of that time limit would lead to anomalous results. 920 F.2d at 1392. The court held that groundless exemptions cannot be legitimized solely because the trustee raised no objection within thirty days. *Id.* at 1393. The court went on to find that the debtors did have a good-faith statutory basis under Minnesota law for exempting as a homestead a house built on the debtor's father's property, and therefore allowed the exemption. *Id.* at 1394-95. Likewise, in *Dembs* the Sixth Circuit rejected mechanical enforcement of the thirty-day time limit on the grounds

that "there must be a good-faith statutory basis for exemption" and that to allow exemptions when there was no good-faith basis for them would amount to "exemption by declaration." 757 F.2d at 780.[3] District Courts and bankruptcy courts in other circuits have agreed that an exemption should not be granted, even if no timely objection was made, unless there was a good-faith statutory basis for the claimed exemption. *In re Kingsbury*, 124 Bankr. 146 (Bankr. D. Me. 1991); *Clark v. Kazi* (*In re Kazi*), 125 Bankr. 981 (Bankr. S.D. Ill. 1991); *Pittsburgh Nat'l Bank v. Wissman (In re Wissman)*, 121 Bankr. 739, 742 (Bankr. N.D. W. Va. 1990); *In re Hansen*, 101 Bankr. 33, 35-36 (Bankr. N.D. Ind. 1988); *Bass v. Hall*, 79 Bankr. 653, 655-66 (W.D. Va. 1987) (following *Dembs*).

As the Third Circuit recognized, its decision also conflicts with a second line of cases construing Section 522(*l*) and Rule 4003(b) followed by numerous federal courts. *In re Staniforth*, 116 Bankr. 127, 131 (Bankr. W.D. Wis. 1990); *Stutterheim v. First State Bank, Alemena, KS (In re Stutterheim)*, 109 Bankr. 1010, 1013 (D. Kan. 1989); *In re Velis*, 109 Bank. 64 (Bankr. D. N.J. 1989), *aff'd*, 123 Bankr. 497 (D. N.J. 1991); *In re Ehr*, 116 Bankr. 665 (Bankr. E.D. Wis. 1988); *Geekie v. Owen* (*In re Owen*), 74 Bankr. 697 (Bankr. C.D. Ill. 1987); *Palatine Nat'l Bank v. Harrigan* (*In re Harrigan*), 74 Bankr. 224, 230 n.4 (N.D. Ill. 1987); *In re Rollins*, 63 Bankr. 780, 783-84 (Bankr. E.D. Tenn. 1986) (nevertheless citing *Dembs* with

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[3] However, the court allowed the exemption at issue because the trustee had not objected to it until after the debtor was discharged. *Dembs*, 757 F.2d at 781.

approval); *Hackett v. Commerical Banking Corp.* (*In re Hackett*), 13 Bankr. 755, 757 (Bankr. E.D. Pa. 1981). This line of cases holds that when a debtor's claimed exemption is not valid under 11 U.S.C. § 522(b), Section 522(*l*) requires no objection by the trustee to disallow the exemption. The thirty-day time limit for trustees' objections is inapplicable in this context. *In re Bennett*, 36 Bankr. 893, 895 (Bankr. W.D. Ky. 1984).

The Third Circuit's decision is supported by a third line of cases holding that exemptions that are not objected to within the thirty-day period are automatically exempt, regardless of their basis in law. *First of America Bank v. Gaylor* (*In re Gaylor*), 123 Bankr. 236, 238 (Bankr. E.D. Mich. 1991); *In re Bradlow*, 119 Bankr. 330 (Bankr. S.D. Fla. 1990); *In re Duncan*, 107 Bankr. 754 (Bankr. W.D. Okla. 1988); *Keenan v. Mt. Carmel Credit Union* (*In re Keenan*), 106 Bankr. 239, 242 (Bankr. D. Colo. 1989); *In re Shrum*, 98 Bankr. 995, 997 (Bankr. W.D. Okla. 1989); *In re Caruthers*, 87 Bankr. 723, 726 (Bankr. N.D. Ga. 1988); *In re Montgomery*, 80 Bankr. 385, 387-88 (Bankr. W.D. Tex. 1987); *Doyle v. Grossman* (*In re Grossman*), 80 Bankr. 311 (Bankr. E.D. Pa. 1987); *In re Payton*, 73 Bankr. 31 (Bankr. W.D. Tex 1987); *In re Hawn*, 69 Bankr. 567, 568-69 (Bankr. E.D. Tenn. 1987) (nevertheless citing *Dembs* with approval); *In re Magosin*, 75 Bankr. 545 (Bankr. E.D. Pa. 1987); *In re Richards*, 57 Bankr. 662 (Bankr. D. Nev. 1986); *In re Anselmi*, 52 Bankr. 479, 485 (Bankr. D. Wyo. 1985); *Kretzer v. DFW Fed. Credit Union* (*In re Kretzer*), 48 Bankr. 585, 587 (Bankr. D. Nev. 1985); *In re Wiesner*, 39 Bankr. 963, 964 (Bankr. W.D. Wis. 1984); *In re Blum*, 39 Bankr. 897, 898 (Bankr. S.D. Fla. 1984); *In re Gullickson*, 39 Bankr. 922, 923 (Bankr. W.D. Wis. 1984); *see also Clark v. Brayshaw*

(*In re Brayshaw*), 912 F.2d 1255, 1256-57 (10th Cir. 1990) (extension for filing objections must be granted within the thirty-day time period or objections are waived); *In re Brandstaetter*, 767 F.2d 324, 327 (7th Cir. 1985) (decided prior to enactment of Rule 4003(b)).

The federal courts have been unable to reach a consensus on this important issue. This irreconcilable, three-way split of authority as to the meaning of Section 522(*l*) of the Bankruptcy Code and Bankruptcy Rule 4003(b) warrants this Court's review.

II. THE DECISION BELOW IS CONTRARY TO THE LANGUAGE OF BANKRUPTCY CODE SECTION 522(*l*) AND BANKRUPTCY RULE 4003(b) AND THEIR UNDERLYING POLICY

Under the Bankruptcy Code, exemptions are limited to either those that are listed in 11 U.S.C. § 522(d) or, alternatively, those that are exempt under other federal law, state law, or local law. 11 U.S.C. § 522(b). Section 522(*l*) provides that "[t]he debtor shall file a list of property that the debtor claims *as exempt under [section 522(b)]*." 11 U.S.C. § 522(*l*) (emphasis added). Thus, Congress incorporated by reference into Section 522(*l*) the requirement that exemptions be based in federal, state, or local law. *Sherk*, 918 F.2d at 1174; *Kingsbury*, 124 Bankr. at 148 & n.9; *Bennett*, 36 Bankr. at 895. Under the statute, claimed exemptions without a basis in law cannot qualify as legitimate exemptions simply because a party in interest makes no objection within the thirty-day period. *Peterson*, 920 F.2d at 1393.

In reaching its decision, the court below focused only on the portion of the statute stating, "Unless a party in interest objects, the property claimed as exempt on such list is exempt." 11 U.S.C. § 522(*l*). *Taylor v. Freeland & Kronz*, 938 F.2d 420 (3d Cir. 1991) (App. 6a, 9a). The Third Circuit's so-called "literal" approach failed to recognize the interdependence of Sections 522(b) and 522(*l*). *See American Hosp. Ass'n v. NLRB*, 111 S. Ct. 1539, 1542 (1991) (statutory provisions must be read as a whole). Read in conjunction, these sections allow debtors to exempt only property that is expressly exempted by statute, not property that the debtor chooses to list as exempt without any grounds for doing so. *Sherk*, 918 F.2d at 1174; *Kingsbury*, 124 Bankr. at 148 & n.9; *Bennett*, 36 Bankr. at 895.

Moreover, permitting debtors to obtain groundless exemptions would clearly contravene "the general [Bankruptcy] Code policy of maximizing the value of the bankruptcy estate." *Toibb v. Radloff*, 111 S. Ct. 2197, 2201 (1991). *See also* S. Rep. No. 95-989, 95th Cong., 2nd Sess. 5, *reprinted in*, 1978 U.S. Code Cong. & Admin. News 5787, 5791 (". . . the policy of the [1978] revision of the Bankruptcy Act [was] to include all of the property of the debtor in the bankruptcy case and to allow the trustee more easily to recover property that may have been transferred by the debtor"). And to reward debtors for claiming groundless exemptions would simply encourage "debtors of questionable integrity to claim *all* of their property as exempt," in the hope that objections might be overlooked. *In re Davis*, 105 Bankr. 288, 293 (Bankr. W.D. Pa. 1989) (App. 39a) (emphasis in original). The result would be "constant litigation, if not outright chaos. . . ." *Id.*

III. THE PROPER INTERPRETATION OF SECTION 522(*l*) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 4003(b) IS AN IMPORTANT AND RECURRENT ISSUE

The proper interpretation of Section 522(*l*) of the Bankruptcy Code and Bankruptcy Rule 4003(b) is an important, frequently recurring problem in federal bankruptcy law. The question presented has percolated in the lower federal courts for more than seven years and has drawn conflicting comment from six courts of appeals, *see Taylor v. Freeland & Kronz*, 938 F.2d 420 (App. 1a); *Peterson*, 920 F.2d 1389; *Sherk*, 918 F.2d at 1174; *Brayshaw*, 912 F.2d at 1256-57; *Dembs*, 757 F.2d 777; *Brandstaetter*, 767 F.2d at 327, and myriad bankruptcy courts. *See* discussion *infra*, at 15-18. This confusion threatens the uniform administration of the Bankruptcy Code and, absent this Court's review, will continue to yield disparate results in factually similar circumstances.

To illustrate the scope of the problem, almost 420,000 individual Chapter 7 cases were filed in the federal courts in 1989 alone. *See Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts* (1989), Tables F & F-2, at 358, 362. Exemptions and the issues surrounding exemptions are essential elements of virtually every individual Chapter 7 bankruptcy.

Resolution of the question presented -- whether a debtor may obtain a groundless exemption solely because no party in interest objected within the time allotted

under Bankruptcy Rule 4003(b) -- will also cast light on related bankruptcy issues. *Compare In re Frazier*, 104 Bankr. 255, 258 (Bankr. N.D. Cal. 1989) (debtor may not avoid liens under Section 522(f) because no party in interest objected to the claimed exemptions under Section 522(*l*)) and *Montgomery*, 80 Bankr. 385 (same) with *In re Van Pelt*, 83 Bankr. 617, 618-19 (S.D. Iowa 1987) (Rule 4003(b) precludes creditors who fail to object to exemptions within thirty days from raising their claims under Section 522(f)). *Compare also Brayshaw*, 912 F.2d at 1256-57 (court may not extend time for filing objections after the Rule 4003(b) period has expired) with *In re Williams*, 124 Bankr. 864, 866 (Bankr. N.D. Fla. 1991) (court may extend time for filing objections after the thirty-day period has expired). *See also Frederick County Nat'l Bank v. Lazerow* (*In re Lazerow*), 119 Bankr. 74, 76 (Bankr. D. Md. 1990) (may joint creditors lift the stay in bankruptcy to pursue state court remedies when the property is exempt under Section 522(*l*) by reason of a failure to timely object?).

The centrality of exemptions to the Chapter 7 bankruptcy system and the importance of Section 522(*l*) and Rule 4003(b) in that scheme cannot be denied. Only this Court can provide the urgently-needed guidance to the federal courts concerning the proper interpretation of Section 522(*l*) and Rule 4003(b).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

GARY W. SHORT
Suite 2317
Koppers Building
Grant Street & Seventh Avenue
Pittsburgh, PA 15219
(412) 765-6100

TIMOTHY B. DYK
(Counsel of Record)
PATRICK J. POTTER
STEPHEN J. GOODMAN
DARRYL R. MARSCH
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

PETER M. LIEB
JONES, DAY, REAVIS & POGUE
599 Lexington Avenue
New York, NY 10022
(212) 326-3939

October 7, 1991

Filed July 8, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-3696

ROBERT TAYLOR,
Appellee

v.

FREELAND & KRONZ;
WENDELL G. FREELAND;
RICHARD F. KRONZ,
Appellants

On Appeal From the
United States District Court
For the Western District of Pennsylvania
(D.C. Civil Action No. 89-2156)

Argued February 28, 1991
BEFORE: STAPLETON and ALITO,
Circuit Judges, and
CAHN, *District Judge**
Opinion Filed July 8, 1991

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* Honorable Edward N. Cahn, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Gary W. Short (Argued)
Suite 2317, Koppers Building
Grant Street and Seventh Avenue
Pittsburg, PA 15219

Attorney for Appellee

Kenneth P. Simon
Phillip S. Simon (Argued)
Simon & Simon
1114 Manor Complex
Pittsburgh, PA 15219

Attorneys for Appellants

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

This Chapter 7 bankruptcy case calls for us to interpret section 522 of the Bankruptcy Code. 11 U.S.C. § 522 (1988). Section 552(*l*) requires that a trustee or other party in interest file with the bankruptcy court any objections to property exemptions claimed by the debtor. In the absence of a filed objection, the property claimed by the debtor as exempt is exempt. The trustee in this case never filed an objection to the exemptions claimed by the debtor. Nevertheless, the bankruptcy court ordered the debtor and her attorneys to pay the trustee the value of part of the property the debtor had claimed as exempt. The district court affirmed. Because we

conclude that such a result is unwarranted under the clear language of the Bankruptcy Code and Bankruptcy Rules, we will reverse the order of the district court.

I.

On October 24, 1984, Emily Davis filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. Her total liabilities were $11,069.59. With her petition for bankruptcy, Davis filed the required "schedules" of her property. On Schedule B-2, on which the debtor lists personal property, Davis cited the potential proceeds of a discrimination lawsuit she had brought against TWA which was then pending on appeal. She indicated the value as "unknown." On Schedule B-4, on which a debtor claims property as exempt, Davis again identified the potential proceeds of the TWA lawsuit and listed the value as "unknown."

On November 26, 1984, Robert Taylor was appointed trustee in the bankruptcy proceeding. On January 4, 1985, Taylor conducted the statutorily required section 341(a) meeting of the creditors of Davis' estate. *See* 11 U.S.C. § 341(a) (1988). Davis and her counsel attended and indicated a possible recovery of $90,000 in the case against TWA.

On January 7, 1985, Taylor mailed a letter to Wendell Freeland and Richard Kronz of Freeland & Kronz, Davis' counsel in the pending TWA suit, advising them that the net proceeds of the lawsuit were an asset of the bankruptcy estate. However, neither Taylor nor any party in interest ever filed with the court a formal objection to Davis' claimed exemptions.

On September 11, 1987, Davis executed a settlement agreement with TWA under which TWA was to pay Davis $110,000. Of this amount, $23,483.75 was allocated to Davis for "back pay or front pay," $23,483.75 to Davis for release of all alleged tort and other claims against TWA, and $63,032.50 to Freeland & Kronz for attorney's fees and costs. On September 17, 1987, TWA issued a check for $71,516.25 payable to Davis and Freeland & Kronz. This check covered the release of tort claims and the attorney's fees. On September 21, 1987, TWA issued another check, payable to Davis, for $16,614.75, which was the amount of her back and front pay after deduction of $6,689.00 for payment of taxes. TWA also distributed $15,000 worth of travel vouchers to Freeland & Kronz pursuant to the settlement agreement.

On May 2, 1988, Taylor sent a letter to Freeland & Kronz requesting information on the status of Davis' cause of action against TWA. On May 6, 1988, Kronz informed Taylor of the settlement. On October 4, 1988, Taylor filed a complaint against Davis, Freeland & Kronz, Wendell Freeland, and Richard Kronz in the bankruptcy court to avoid post-petition transfers and to recover either the property transferred or the value of such property. On September 7, 1989, the United States Bankruptcy Court for the Western District of Pennsylvania ordered the defendants to return $23,483.75 plus interest to Taylor. 105 Bankr. 288 (Bankr. W.D. Pa. 1989). This represented the amount awarded in the TWA settlement for release of tort claims. Freeland & Kronz and the individuals Wendell Freeland and Richard Kronz (hereinafter Freeland & Kronz) appealed to the district court. On September 7, 1990, the United States District Court for the Western District of Pennsylvania affirmed the bankruptcy court's order. 118

Bankr. 272 (W.D. Pa. 1990). Freeland & Kronz filed a notice of appeal in this court from the district court's order.

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. § 157. The district court had jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a). We have jurisdiction pursuant to 28 U.S.C. § 158(d) over the appeal from the order of the district court.

II.

The issue raised by this appeal is whether the bankruptcy court and the district court correctly interpreted section 522(*l*). Freeland & Kronz claims that the proceeds of Davis' TWA suit are exempt because Davis claimed them as exempt and no party in interest filed a timely objection to the claimed exemptions. Taylor argues that claimed exemptions that are invalid under section 522(b) cannot be considered valid solely because no party in interest filed an objection with the court. We exercise plenary review of this question of law. *Dawson v. United States*, 894 F.2d 70, 72 (3d Cir. 1990).

The statutory background is not complicated. Once the bankruptcy estate is created, the debtor may exempt certain property from it pursuant to section 522. If the trustee or another party in interest objects to a claimed exemption, the bankruptcy court must determine pursuant to section 522(b) -- the subsection that specifies the allowable exemptions -- what property is exempt and what property remains property of the estate. When a claimed exemption is upheld by the court, the property so exempted is no longer considered property of the bankruptcy estate.

As noted, a threshold requirement must be met before the court may consider the validity of the claimed exemptions. Section 522(*l*) states: "The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section . . . . Unless a party in interest objects, the property claimed as exempt on such list is exempt." The Bankruptcy Rules, which took effect on August 1, 1983, flesh out the statutory requirements. Bankruptcy Rule 4003(b) provides: "The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment of the list unless, within such period, further time is granted by the court." Bankruptcy Rule 9006(b)(3) allows enlargement of the time period for taking action under certain bankruptcy rules, but specifically states that the court "may enlarge the time for taking action under Rule[] . . . 4003(b) . . . only to the extent and under the conditions stated in those rules."

The statute and rule establish a strict procedure for objections to claimed exemptions. Their import is clear and they admit of no exception. Unless the trustee or another party in interest objects to the debtor's claimed exemptions within the thirty-day period following the creditors' meeting or the amendment, the property claimed as exempt by the debtor is exempt. No provision of the Code provides that the failure to object is excused when the debtor's exemption claim is not advanced "in good faith," nor is there an exception provided for situations where a claimed exemption has only a questionable basis in section 522(b).

Despite the seemingly clear statutory scheme, the courts have not been unanimous in interpreting section

522(*l*). Courts have taken three different approaches to this issue. Under the first, the "literal" approach, a court will not examine the merits of a claimed exemption if an objection is not filed within the time allowed. *See, e.g., In Re Bradlow*, 119 Bankr. 330 (Bankr. S.D. Fla. 1990); *In re Duncan*, 107 Bankr. 754 (Bankr. W.D. Okla. 1989); *Doyle v. Grossman (In re Grossman)*, 80 Bankr. 311 (Bankr. E.D. Pa. 1987) (citing earlier decisions by bankruptcy courts reaching the same result); *In re Payton*, 73 Bankr. 31 (Bankr. W.D. Tex. 1987).

Under the second approach, an objection is not necessary if the debtor's claimed exemption is invalid under section 522(b). *See, e.g., Stutterheim v. First State Bank, Alemena, KS (In re Stutterheim)*, 109 Bankr. 1010, 1013 (D. Kan. 1989); *In re Staniforth*, 116 Bankr. 127 (Bankr. W.D. Wis. 1990); *In re Velis*, 109 bankr. 64 (Bankr. D.N.J. 1989), *aff'd*, 123 Bankr. 497 (D.N.J. 1991); *In re Bennett*, 36 Bankr. 893 (Bankr. W.D. Ky. 1984). The *Bennett* court set forth the equitable considerations that other courts adopting this approach have found persuasive. The court first noted that, read literally, the statute is clear that unless a party objects the debtor's claimed exemptions are exempt. But the court refused to follow this language: "we are unable to give the expected legal effect to statutory language which, standing alone, seems perfectly clear." *Bennett*, 36 Bankr. at 894. If it accepted such a reading, the court declared, the result would be "exemption by declaration," and we "would revert to the law of the streets, with bare possession constituting not nine, but ten, parts of the law; orderly administration of estates would be replaced by uncertainty and constant litigation if not outright anarchy." *Id.* at 895.

The third approach occupies a middle ground between the literal reading of the statute and *Bennett*. Under this approach, a court is to examine a claimed exemption, even when no timely objection has been formally filed, to determine if there exists a "good-faith statutory basis" for the claimed exemption. If there is a good-faith basis, the exemption is allowed; if there is not a good-faith basis, the exemption is not allowed. Two federal courts of appeals have adopted this approach. *See In re Peterson*, 920 F.2d 1389 (8th Cir. 1990); *Munoz v. Dembs (Matter of Dembs)*, 757 F.2d 777 (6th Cir. 1985); *see also In re Idvik*, 118 Bankr. 993 (Bankr. N.D. Iowa 1990).

In *Dembs*, the Sixth Circuit stated that the "clear import of [Rule 4003(b)] and of section 522(*l*) is that objections to claimed exemptions must be made within thirty days after the creditors' meeting or any amendment, or they are waived." *Dembs*, 757 F.2d at 780. But the court did not end its discussion there: "We do not mean by this to endorse 'exemption by declaration'; there must be a good-faith statutory basis for exemption, and in that respect we fully approve *In re Bennett*." *Id*. In *Peterson*, the Eighth Circuit agreed with the Sixth Circuit's analysis. Although noting that "Rule 4003(b) establishes a bright-line, thirty-day limit for objections to claimed exemptions," the court adopted the bad-faith exception to avoid the "undesirable effects of 'exemption by declaration.'" *Peterson*, 920 F.2d at 1393. Thus, the court held that despite the absence of a timely objection, a court must examine the merits of a claimed exemption to determine if it was made in good faith.

In the instant case, both the bankruptcy court and the district court followed *Bennett*. The bankruptcy court, though noting that "plausible arguments" could be made in support of a literal reading of the statute, concluded that *Bennett* represents the "superior view." 105 Bankr. at 929. The court relied on section 522(b), which states that a debtor may exempt property that is exempt under federal, state, or local law. The court stated that this language would be superfluous if section 522(*l*) were given its literal effect. *Id.* at 292-93. The bankruptcy court also cited policy reasons in support of its position. A literal reading would provide an incentive for debtors of questionable property to claim all of their property as exempt. *Id.* at 293. The district court agreed with the bankruptcy court's analysis and result, stating that a contrary holding would lead to "exemption by declaration." 118 Bankr. at 275.

III.

We respectfully disagree with the conclusion reached by the courts below and by the Courts of Appeals for the Sixth and Eighth Circuits. We will adhere to the clear and orderly scheme Congress enacted for property exemption determinations and hold that in the absence of an objection filed within thirty days after the section 341(a) creditors' meeting or the filing of an amendment to the exemption list, property claimed as exempt by the debtor is exempt.

A.

Our task is "to interpret the rules neither liberally nor stingily, but only, as best we can, according to their apparent intent. Where that intent is to provide leeway,

a permissive construction is the right one; where it is to be strict, a permissive construction is wrong." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 319 (1988) (Scalia, J., concurring). As we have explained earlier, the text of section 522(*l*) and Rule 4003(b) could not be much clearer in stating without exception that property claimed as exempt by the debtor is exempt unless a timely objection is filed with the court by a party in interest. That all but resolves this case, for the general rule of statutory interpretation is that where "the terms of a statute [are] unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." *Demarest v. Manspeaker*, 111 S. Ct. 599, 604 (1991). Such circumstances are present only in the "rare" case where "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters," *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); in other words, a result "so bizarre that Congress 'could not have intended' it." *Demarest*, 111 S. Ct. at 604 (quoting *Griffin*, 458 U.S. at 575).

This case is not one of the "rare" cases. The literal interpretation of section 522(*l*) and Rule 4003(b) produces a result -- not allowing a party in interest to object to a debtor's claimed exemptions after the time period for doing so has elapsed -- that is not "demonstrably at odds with the intentions of the drafters." The text of the statute and rule, the legislative history, and a comparison of the present statute and rule with the statute and rule previously in effect all indicate that Congress intended a strict rule: a party in interest must

file a timely objection, or the property claimed as exempt by the debtor is exempt.

The text is of course the best indication of Congress' intent, *West Virginia Univ. Hosp., Inc. v. Casey*, 111 S. Ct. 1138, 1147 (1991), and the text here admits of no exceptions to the bright-line procedural rule. Furthermore, the evolution of the bankruptcy laws suggests that Congress intended to shift the burden of objection from the debtor to the other parties in interest. The pre-1978 version of the bankruptcy laws and former Bankruptcy Rule 403 required the trustee to file a report which separated allowable exemption claims from those not allowable. The burden was then on the debtor and the creditors to object within 15 days. If the debtor and creditor failed to object within 15 days, the exemptions as reported by the trustee were allowed. The Advisory Committee Note to present Rule 4003 states, "[t]he Code changes the thrust of [the former rule] by making it the burden of the debtor to list his exemptions and the burden of parties in interest to raise objections in the absence of which 'the property claimed as exempt on such list is exempt.'" Fed. R. Bankr. 4003 advisory committee's note (quoting 11 U.S.C. § 522(*l*)).

An examination of the legislative materials accompanying section 522 yields Taylor no better result. The House Report states: "Subsection (*l*) requires the debtor to file a list of property that he claims as exempt from the property of the estate. Absent on objection to the list, the property is exempted." H.R. Rep. No. 595, 95th Cong., 2d Sess. 363, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6319. Nothing in the legislative materials suggests that any exceptions to this bright-line rule were intended.

Congress intended a strict rule, and the result achieved by following the strict textual requirement is not a result "demonstrably at odds" with that intent. In fact, only by allowing an exception to the strict rule would we cause a result demonstrably at odds with the legislative intent.

B.

The courts that have departed from the statutory language have identified a number of policy factors that, in the opinion of those courts, support a non-literal reading of the statute and rule. Before we address them, we first note that even if we were authorized to disagree with Congress on the basis of our policy views, it is not clear that we would do so here. A strong policy rationale supports the literal approach. The time limits and obligations established by section 522(*l*) and Rule 4003(b) serve the dual purposes of finality and certainty. In the bankruptcy context, the need for finality and certainty is especially acute. *See Hoos & Co. v. Dynamics Corp. of America*, 570 F.2d 433, 439 (2d Cir. 1978); *Grossman*, 80 Bankr. at 314-15; *see also* Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178-79 (1989) ("Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law."). This need is reflected by Bankruptcy Rule 9006, which states that "[i]n the interest of prompt administration of bankruptcy cases certain time periods may not be extended." Fed. R. Bankr. 9006 advisory committee's note. Thus, where there is a date when the parties' rights can be finally determined -- in this case, thirty days after the creditors' meeting if no objection is filed -- the parties can proceed from the date knowing which property is property of the estate and which property belongs to the debtor. The

debtor from that day forward can treat exempted property as his or her own and is not forced to wait until some unknown future date when the trustee or another party in interest might haul the debtor into court seeking that property.

We turn now to some of the policy considerations that other courts have cited in support of an exception to a literal interpretation of the statute. It is true, as the Eighth Circuit noted, that strict compliance with the section 522(*l*) and Rule 4003(b) might in certain cases provide the debtor with an "undeserved windfall." *Peterson*, 920 F.2d at 1393. That is true of enforcement of all procedural rules, yet the Supreme Court has not been willing to disregard a clear procedural rule simply out of an ex post concern for fairness in the individual case. For example, in *Torres*, 487 U.S. at 312, a case presenting more compelling circumstances than the instant case for relaxing a bright-line procedural rule, the Supreme Court decided that the failure to list one of the appellants on the notice of appeal in accordance with Civil Rule 3(c) deprived the appellate court of jurisdiction over that appellant's case. Justice Marshall stated for the Court, "We recognize that construing Rule 3(c) as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is 'imposed by the legislature and not by the judicial process.'" *Id.* at 318. Compliance with section 522(*l*) and Rule 4003(b) may lead in certain cases to an undeserved windfall for the debtor. But we, like the Supreme Court, will not disturb the clear language of the statute and rule to prevent a windfall.

The courts departing from the statutory language have also expressed concern that a literal reading would

lead to a system of "exemption by declaration" whereby the debtor would have incentive to claim all property as exempt in the hope that no party in interest would object. *See, e.g., Bennett*, 36 Bankr. at 895. Inserting an exception into section 522 in order to achieve this policy goal ignores two safeguards that already ensure that debtors have little or no incentive to claim all of their property as exempt. First, and most importantly, Bankruptcy Rule 9011, which is analogous to Rule 11 of the Civil Rules, forbids bad faith exemption claims and authorizes sanctions for violation of this prohibition. Rule 9011 should act as the primary deterrent against debtors engaging in bad faith exemption claims. Second, no external impediment prevents a trustee or other party in interest from filing objections to the claimed exemptions. The only hindrance is such a party's neglect. Thus, in the vast majority of cases, overzealous claims of exemptions by a debtor will serve only to induce the enmity of the other parties and of the court.

The bankruptcy court in the instant case stated that a literal reading of section 522(*l*) would render section 522(b) superfluous. 105 Bankr. at 292-92. We disagree. Once an exemption has been claimed, a two-step approach applies. The threshold requirement, which is imposed by section 522(*l*), is a timely objection by a party in interest. If such an objection is filed, then the bankruptcy court is to decide if the claimed exemption fits into one of the categories listed in section 522(b). Section 522(b) is not rendered superfluous by a literal reading of section 522(*l*); it will be involved in almost all cases -- those where a party in interest properly objects. Indeed, the bankruptcy court's reading of the statute would render section 522(*l*) meaningless.

IV.

Absent a timely filed objection, the property claimed by a debtor as exempt under section 522 of the Bankruptcy Code is exempt. In this case, Davis the debtor claimed the potential proceeds of her then-pending lawsuit against TWA as exempt. No objection to that claimed exemption was filed with the court by any party in interest. The proceeds of the TWA suit are thus exempt. Because we find for Freeland & Kronz on this issue, we need not decide other issues it has raised. We will reverse the order of the district court.

A true Copy:
Teste:

Clerk of the United State Court of
Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

In Re:
EMILY DAVIS,
a/k/a EMILY WINN,

Civil Action No. 89-2156
Bankruptcy No. 84-2291
Adversary No. 88-446

Debtor,

ROBERT J. TAYLOR,
Trustee,

Plaintiff,

vs.

FREELAND & KRONZ, a partnership,
WENDELL G. FREELAND, RICHARD F.
KRONZ and EMILY DAVIS,

Defendants.

ORDER

AND NOW, this 7th day of September, 1990, upon consideration of the defendants' Appeal from the Bankruptcy Court's Order entered September 7, 1989, directing the appellants to return to the trustee $23,483.75, plus interest at the prevailing legal rate,

IT IS HEREBY ORDERED that said Appeal is DENIED, and the Bankruptcy Court's Order dated September 7, 1989, is AFFIRMED.

/s/ Alan N. Bloch
United States District Judge

cc: Gary W. Short, Esquire
Suite 2317, Koppers Building, Pittsburgh, PA 15219

Stanley E. Levine, Esquire
3100 Grant Building, Pittsburgh, PA 15219

Kenneth P. Simons, Esquire
1114 Manor Complex, Pittsburgh, PA 15219

Clerk, Bankruptcy Court
16th Floor, Federal Building, Pittsburg, PA 15222

U.S. Bankruptcy Judge Bernard Markovitz
16th Floor, Federal Building, Pittsburg, PA 15222

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

In Re:

EMILY DAVIS,
a/k/a EMILY WINN,

Debtor

Civil Action No. 89-2156
Bankruptcy No. 84-2291
Adversary No. 88-446

ROBERT J. TAYLOR,
Trustee,

Plaintiff,

vs.

FREELAND & KRONZ, a partnership,
WENDELL G. FREELAND, RICHARD F.
KRONZ and EMILY DAVIS,

Defendants.

MEMORANDUM OPINION

BLOCH, District J.

In this bankruptcy action, defendants appeal the decision of the bankruptcy court allowing the trustee of the bankruptcy estate of Emily Davis (the debtor) tc recover certain post-petition transfers. For the reasons that follow, this Court affirms the award of the bankruptcy court.

I. Facts

The debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code (the Code) on October 24, 1984. At the time of the filing, the debtor was pursuing a legal action against her employer, Trans World Airlines (TWA). In a complaint filed with the Pittsburgh Human Relations Commission (Commission), the debtor alleged that TWA had discriminated against her in denying her promotions on the basis of her race and sex. The Commission found in the debtor's favor on December 16, 1980, but did not award damages at that time. When TWA appealed the Commission's decision to the Court of Common Pleas of Allegheny County, Pennsylvania, the debtor retained defendant Freeland & Kronz to represent her.

The Court of Common Pleas reversed the Commission's decision on September 23, 1981. The debtor appealed the decision to the Commonwealth Court of Pennsylvania, which reversed the decision of the Court of Common Pleas and reinstated the Commission's decision. TWA was then granted an allowance of appeal by the Pennsylvania Supreme Court. The Pennsylvania Supreme Court, however, had not rendered a decision at the time that the debtor filed her petition.[1]

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[1] The decision of the Commonwealth Court was affirmed on November 29, 1984. The Pennsylvania Supreme Court later granted TWA's petition for reargument. On October 1, 1986, the Court concluded that reargument had been improvidently granted and dismissed TWA's appeals.

In her schedule of assets and liabilities, the debtor listed the proceeds of the TWA lawsuit with an unknown value on Bankruptcy Schedule B-2. The debtor also claimed the proceeds of the cause of action as exempt on Schedule B-4 pursuant to 11 U.S.C. §§ 522(b) and (d), and listed its value as unknown. The debtor stated on Schedule A-2 that there were no creditors holding security. The debtor listed a total of $11,069.59 in liquidated and undisputed liabilities to unsecured creditors on Schedule A-3.

On January 4, 1985, the trustee presided over a § 341(a) meeting of creditors. The debtor and her counsel attended the meeting and indicated a possible recovery of $90,000 in the TWA lawsuit. Although the trustee advised the debtor on several occasions of his opinion that the cause of action from the TWA lawsuit was an asset of the estate, he failed to formally object to the exemption within the 30-day time period required by Bankruptcy Rule 4003(b).

On September 11, 1987, the debtor executed a settlement agreement with TWA which had a value approximating $110,000. The debtor granted TWA a release of all claims against it in consideration of $95,000 in cash, plus other valuable consideration (travel vouchers) worth approximately $15,000. The settlement agreement provided that the consideration was to be paid as follows:

> (1) $23,483.75, less applicable taxes, was to be paid to the debtor "as and for back pay and front pay";

(2) an additional $23,483.75 was to be paid to debtor " . . . as and for all alleged tort claims or any other claims not represented (sic) asserted wage losses"; and

(3) $63,032.50 was to be paid to debtor and Freeland & Kronz for attorney's fees and costs. Of this amount, $48,032.50 was to be paid in cash. The remaining $15,000 consisted of "miscellaneous charge orders" (i.e., travel vouchers) which could be used either by Freeland & Kronz or their designees for the purchase of air transportation from TWA.

When the trustee sent a letter to Freeland & Kronz requesting information on the status of the debtor's cause of action, Richard Kronz informed him of the settlement. On October 6, 1988, the trustee filed a complaint to avoid post-petition transfers and to recover property distributed or the value of such property. On September 7, 1989, the bankruptcy court ordered the defendants to return to the trustee $23,483.75, plus interest. That sum represented the proceeds allocated for the settlement of tort claims.

II. Discussion

The appellants first argue that the bankruptcy court erred as a matter of law when it allowed the trustee to recover proceeds of the debtor's TWA lawsuit which the debtor had claimed as exempt. The debtor's exemption claim was made pursuant to § 522(*l*) of the Bankruptcy Code, which provides:

The Debtor shall file a list of property that the Debtor claims as exempt under subsection (b) of

> this section . . . . Unless a party in interest objects, the property claimed as exempt on such list is exempt.

11 U.S.C4. § 522(*l*). The time limit for objecting to a claim of exemption is set forth in Bankruptcy Rule 4003(b):

> The Trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list unless, within such period, further time is granted by the court.

Because the trustee did not file objections to the debtor's claimed exemption within 30 days as required by Bankruptcy Rule 4003(b), the appellants argue that the proceeds of the debtor's lawsuit are exempt.

The bankruptcy court recognized that there is a difference of opinion among those courts which have considered the question whether a claimed exemption that is not objected to in a timely manner by a party in interest is thereby granted in every instance:

> Some courts have held that failure of any party in interest to timely object to a claimed exemption results in allowance of the objection *as declared*. *See In re Grossman*, 80 B.R. 311 (Bankr. E.D. Pa. 1987); *In re Hawn*, 69 B.R. 567 (Bankr. E.D. Tenn. 1987); *In re Hahn*, 60 B.R. 69 (Bankr. D. Minn. 1986); *In re Kretzer*, 48 B.R. 585 (Bankr. D. Nev. 1985); *Matter of Thomas*, 43 B.R. 201 (Bankr. M.D.

> Ga. 1984); *Matter of Wiesner*, 39 B.R. 963 (Bankr. W.D. Wis. 1984); *Matter of Gullickson*, 39 B.R. 922 (Bankr. W.D. Wis. 1984).
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> Other courts have voiced concern that rigid enforcement of § 522(*l*), without further qualification, would permit what is tantamount to "exemption by declaration." They construe this subsection as implicitly containing the additional requirement that there be a statutory basis for the claimed exemption before the failure of any party in interest to timely object to it has any legal effect. *See Matter of Dembs*, 757 F.2d 777 (6th Cir. 1985); *In re Rollins*, 63 B.R. 780 (Bankr. E.D. Tenn. 1980); *In re Bennett*, 36 B.R. 893 (Bankr. W.D. Ky. 1984).

In Re Davis, 105 B.R. 288, 292 (W.D. Pa. 1989).

Several factors persuaded the bankruptcy court to conclude that the latter view, as articulated in *In Re Bennett*, was the better view. First, the bankruptcy court was persuaded by the explicit incorporation by reference in § 522(*l*) of § 522(b), which limits exemptions to "any property that is exempt under federal law . . . or state law or local law that is applicable on the date of the filing of the petition." 11 U.S.C. § 522(b). The bankruptcy court concluded that no purpose would be served by § 522(b) if a debtor could select in any manner her exemptions. *In Re Davis*, 105 B.R. at 293. Second, the bankruptcy court's decision was based upon policy considerations. The bankruptcy court concluded that the view articulated in *In Re Grossman* would encourage debtors to claim all of their property as exempt, thereby hindering the orderly administration of the debtor's estates. *Id.*

This Court is similarly persuaded that § 522(*l*) contains the additional requirement that there be a statutory basis for a claimed exemption before the failure of any person in interest to timely object to it has any legal effect. In the present case, there was no statutory basis for claiming as exempt that part of the lawsuit's proceeds which represented recovery for tort claims. Allowing the debtor to recover proceeds for which there was no statutory basis would render § 522(b) negutory. Furthermore, the orderly administration of the debtor's estate would not be advanced by allowing her to claim as exempt any value which she had simply designated "unknown." If she were allowed to do so, the burden would shift to the trustee to insure that there was a statutory basis for each claimed exemption. If, as in the instant case, the trustee failed to dispute a claimed exemption,[2] the debtor's action essentially would amount to an exemption by declaration.

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[2] Of the cases cited by the bankruptcy court for the proposition that failure to timely object to a claimed exemption results in allowance of the exemption as declared, only *In Re Grossman*, 80 B.R. 311 (Bankr. E.D. Pa. 1987), provides a rationale which incorporates more than a restatement of the express terms of § 522(*l*). In *Grossman*, the Court stated that "in most instances outlandish exemptions will be discovered" because the "trustee is permitted to object to objection claims, presides over the meeting of the creditors . . . where exemption claims should be reviewed, and has a fiduciary obligation to protect the interests of creditors." 80 B.R. at 313. In the present case, this safeguard did not exist. Although the trustee advised the debtor before the deadline for making an objection that the cause of action was an asset of the estate, he failed to timely object to the debtor's claimed exemption.

The appellants next argue that the bankruptcy court erred as a matter of law when it included in its valuation of the debtor's cause of action attorney's fees which were incurred post-petition. The appellants argue that because they had a lien against certain of the proceeds, the estate could not recover those proceeds. In addition, the appellants contend that the bankruptcy court was clearly erroneous when it included in its valuation of the debtor's cause of action attorney's fees which were a separate element of a settlement made almost two years after the discharge, partially incurred post-petition and never claimed by the trustee. This Court, however, need not determine whether appellants had a valid lien against certain proceeds. By avoiding only $23,483.75 of the $71,516.25 transferred, the bankruptcy court allowed for the full amount of the attorney's lien. Therefore, the bankruptcy court did not commit reversible error in valuing the lawsuit at $110,000 without specific reference to an attorney's lien.

The appellants' final argument is that the bankruptcy court erred as a matter of law in holding that the doctrine of judicial estoppel prevented the appellants from asserting in the bankruptcy proceeding that a portion of the settlement, which had been allocated for tort claims in the TWA lawsuit, represented pension benefits. During the bankruptcy proceeding, "[d]efendant testified that this portion of the settlement in reality was for lost wages, but was described as being for tort claims in order to avoid payment of applicable taxes." *Davis*, 105 B.R. at 293-94. However, appellants now apparently seek to characterize the portion of the settlement differently because recovery for tort claims is not exemptable.

The general principle of judicial estoppel is that "'[a] party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same . . . suit[s].'" *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1959). Appellants have assumed inconsistent positions with respect to the proceeds from the TWA lawsuit. Appellants now maintain that the reason for the mischaracterization of the proceeds was to avoid income tax liability. Appellants cite *City of Kingsport v. Steel & Roof Structure, Inc.*, 500 F.2d 617, 620 (6th Cir. 1974), for the proposition that the doctrine of judicial estoppel does not apply to settlement agreements. In *City of Kingsport*, the Court held that because of the settlement of the plaintiff's case, the defense of the bar of statute of limitations was never decided and, therefore, no estoppel could exist. However, in the present case, the appellants assumed a position with regard to the proceeds of the TWA lawsuit during the first suit, and the proceeds were ultimately allocated pursuant to that characterization. Appellants may not now assume a contradictory position with regard to the proceeds allocated for tort claims.[3]

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[3] Appellants seek to recharacterize the proceeds as being for pension benefits. Appellants argue that a "major component of the debtor's claim against TWA was for pension benefits." Having reviewed the record on appeal, this Court finds that the settlement did not, in fact, represent pension loss.

For the foregoing reasons, this Court affirms the order of the bankruptcy court directing the appellants to return to the trustee $23,483.75, plus interest at the prevailing legal rate.

An appropriate Order will be issued.

Date: 9/7/90 /s/ Alan N. Bloch
United States District Judge

cc: Counsel of record.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

In Re: Bankruptcy No. 84-2291

EMILY DAVIS, a/k/a
EMILY WINN,

Debtor

Adversary No. 88-0446

ROBERT J. TAYLOR,
Trustee,

Plaintiff

v.

FREELAND & KRONZ, a
partnership; WENDELL G.
FREELAND,
RICHARD F. KRONZ; and
EMILY DAVIS,

Defendants.

ORDER OF COURT

AND NOW at Pittsburgh in said District this 7th day of September, 1989, in accordance with the foregoing Memorandum Opinion of this same date, it is hereby ORDERED, ADJUDGED and DECREED that Defendants Emily Davis and Freeland & Kronz, return to

Plaintiff Robert J. Taylor, Trustee, the amount of $23,483.75, plus interest at the prevailing legal rate.

/s/ Bernard Markovitz
BERNARD MARKOVITZ
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

In Re: Bankruptcy No. 84-2291

EMILY DAVIS, a/k/a
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Debtor

Adversary No. 88-0446

ROBERT J. TAYLOR,
Trustee,

Plaintiff

vs.

FREELAND & KRONZ, a
partnership; WENDELL G.
FREELAND,
RICHARD F. KRONZ; and
EMILY DAVIS,

Defendants

MEMORANDUM OPINION

Before the Court is the Trustee's *Complaint To Avoid Post-Petition Transfers, And To Recover The Property Transferred Or The Value of Such Property*. Specifically, Robert J. Taylor, Trustee ("Trustee") seeks to avoid and recover certain postpetition transfers of the proceeds of

the settlement of a legal action brought by Emily Davis ("Debtor") against Trans World Airlines ("TWA").

The Trustee contends that the payment of that portion of the settlement which was allocated to lost wages suffered by Debtor prior to the bankruptcy filing is "property of the estate" and consequently, any transfer thereof is avoidable pursuant to 11 U.S.C. § 549(a). The Trustee further claims that, pursuant to 11 U.S.C. § 550(a), he is entitled to recover $67,349.00, plus interest, which sum is the alleged value of the estate's interest in the cause of action at the time the bankruptcy petition was filed.

Defendants argue that the proceeds of the settlement are not "property of the estate". In the alternative, Defendants aver that if they were estate assets, said assets were exempted by Debtor. Defendants opine that as no party in interest, including the Trustee, has objected to the exemption of the cause of action, said exemption, whether having a statutory basis or not, should be permitted.

The Court has heard the testimony of the parties, reviewed all of the exhibits, and researched the law, and now finds that the Trustee may avoid and recover $23,483.75, plus interest. Said sum will be sufficient to pay all creditors one hundred percent (100%) of their claims plus interest, if interest is appropriate. In addition, excess funds will be available for payment of appropriate administrative fees and costs. Any sum not utilized will be returned to Defendants.

FACTS

Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on October 24, 1984. At the time of the filing, Debtor was pursuing a legal action against TWA alleging employment discrimination. Debtor had filed a complaint in April of 1978 with the Pittsburgh Human Relations Commission ("Commission") in which she alleged that TWA had discriminated against her in denying promotions on account of her race and sex.

The Commission found in favor of Debtor on December 16, 1980. It did not, however, award damages at that time; rather, it directed TWA to submit further information in order that the amount of damages might be determined.

TWA appealed the Commission's decision to the Court of Common Pleas of Allegheny County, Pennsylvania. At that point, prior counsel's representation was terminated and the law firm of Freeland & Kronz was retained to represent the Debtor. The Commission's decision was reversed by the Court of Common Pleas on September 23, 1981.

Debtor appealed this decision to the Commonwealth Court of Pennsylvania, which reversed the decision of the Court of Common Pleas, and reinstated the decision of the Commission on June 27, 1983.

TWA then petitioned the Pennsylvania Supreme Court for an Allowance of Appeal, which was granted in November of 1983. The decision of the Commonwealth Court was affirmed on November 29, 1984 by an equally divided vote of the Supreme Court. Mr. Justice

Papadakos, who as a Common Pleas Judge had previously reversed the decision of the Commission, did not participate in the decision.

TWA thereafter petitioned the Pennsylvania Supreme Court to permit it to file an Application For Reargument Out of Time. The Application was allowed and the matter was reargued on September 16, 1986. On October 1, 1986, the Supreme Court concluded that reargument had been improvidently granted and dismissed the appeal of TWA.

Debtor's cause of action against TWA was before the Pennsylvania Supreme Court for the first time when she filed her Chapter 7 voluntary petition on October 24, 1984. The appeal by TWA had been briefed and argued, but was not decided until approximately five (5) weeks later.

Debtor listed the proceeds of the legal action against TWA with an unknown value on Bankruptcy Schedule B-2. She also claimed the proceeds of the cause of action as exempt on Schedule B-4 pursuant to 11 U.S.C. §§ 522(b) and (d) and listed its value as "unknown". In addition, Debtor stated on Schedule A-2 that there were no creditors holding security and on Schedule A-3 listed a total of $11,069.59 in liquidated and undisputed liabilities to unsecured creditors.

Robert F. Taylor, Esq., was appointed Interim Trustee on November 26, 1984, and he presided over a Section 341(a) Meeting of Creditors on January 4, 1985. Debtor and her bankruptcy counsel attended the meeting and they indicated a possible recovery in the cause of action against TWA of $90,000.00. The Proceeding

Memo prepared by the Trustee evidenced Debtor and/or Debtor's counsel's acknowledgment of the litigation and its potential value, and noted that the matter was on appeal at that time.

The Trustee, on various occasions prior to and subsequent to the time frame for objecting to exemptions, advised Debtor of his legal position that the cause of action was an asset of the estate; however, on no occasion did he perform the obvious, namely, formally object to the exemption of this estate asset.

Debtor received a discharge from bankruptcy on October 16, 1985; however, the case has never been closed.

On September 11, 1987, Debtor executed a settlement agreement with TWA which had a value approximating $110,000.00. Debtor granted TWA a release of all claims against it in consideration of $95,000.00 in cash, plus other valuable consideration (travel vouchers) worth approximately $15,000.00

According to the precise and agreed upon terms of the settlement contract negotiated by the parties, the consideration to Debtor was to be ". . . paid, allocated, and apportioned . . ." as follows:

(1) $23,483.75, less applicable taxes, was to be paid to Debtor "as and for back pay or front pay";

(2) An additional $23,483.75 was to be paid to Debtor ". . . as and for all alleged tort claims

or any other claims not represented (sic) asserted wage losses"; and

(3) $63,032.50 was to be paid to Debtor and Freeland & Kronz for attorney's fees and costs. Of this amount, $48,032.50 was to be paid in cash. The remaining $15,000.00 consisted of "miscellaneous charge orders" (i.e., travel vouchers) which could be used either by Freeland & Kronz or their designees for the purchase of air transportation from TWA.

On September 17, 1987, TWA issued a check payable to Debtor and Freeland & Kronz in the amount of $71,516.25, in satisfaction of those portions of the settlement allocated to tort claims ($23,483.75) and to attorney's fees and costs ($48,032.50).

On September 21, 1987 TWA issued another check, payable to Debtor, in satisfaction of that portion of the settlement allocated to back pay or front pay. The check was in the amount of $16,614.75, with the remaining $6,689.00 deducted for taxes.

On October 21, 1987 Freeland & Kronz disbursed the check for $71,516.25 as follows: $32,159.50 was distributed to Debtor; the remaining $39,356.75 was distributed to Freeland & Kronz.

Freeland & Kronz also received, pursuant to the settlement, $15,000.00 worth of travel vouchers. It retained $7,500.00 worth of them and assigned the remaining $7,500.00 worth to Debtor for her own use.

The Trustee sent a letter to Freeland & Kronz on May 2, 1988, requesting information on the status of Debtor's cause of action. Richard Kronz informed the Trustee of the settlement on May 6, 1988.

On October 8, 1988, the Trustee commenced the present adversary proceeding by filing a Complaint To Avoid Post-Petition Transfers, And To Recover The Property Distributed Or The Value of Such Property.

ANALYSIS

With certain exceptions not relevant here, the trustee may avoid any postpetition transfer of "property of the estate" of a debtor that is not authorized under the Code or by the Court. 11 U.S.C. § 549(a). In addition, the trustee may recover, for the benefit of the estate, either the property transferred or the value of such property from the initial transferee or any immediate transferee of such initial transferee. 11 U.S.C. § 550(a).

11 U.S.C. § 541 defines, with substantial specificity, what kinds of property are "property of the estate". Congress intended a broad range of property to be brought into the estate. *U.S. v. Whiting Pools*, 462 U.S. 198, 204 (1983). Section 541 includes all kinds of property, both tangible and intangible, cause of action, and all other forms of property formerly specified in Section 70(a) of the old Bankruptcy Act. 4 Collier on Bankruptcy ¶ 541.01 at 541-5 (15th ed. 1989), *citing to* H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-68 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82-3 (1973). It even includes property needed for a debtor's fresh start. *Warren v. G.M. Scott & Sons*, 34 B.R. 543, 544 (Bankr. S.D. Ohio 1983).

Once property is included in the bankruptcy estate, the debtor may exempt it pursuant to 11 U.S.C. § 522. The Bankruptcy Court must then determine what property may be exempted and what remains property of the estate. *See* 4 Collier on Bankruptcy ¶ 541.01 at 541-6 (15th ed. 1989). When a claimed exemption is upheld by the court, the property so exempted no longer is considered property of the estate. *See In re Gagnard*, 17 B.R. 811, 813 (Bankr. D. La. 1982).

Defendants contend that the proceeds of the settlement were exempted from Debtor's estate, and hence are not subject to 11 U.S.C. §§ 549(a) and 550(a), as neither the Trustee, nor any other party in interest, ever objected to Debtor's claimed exemption in the proceeds of the cause of action.

11 U.S.C. § 552(*l*) provides in relevant part that:

> The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. . . . Unless a party in interest objects, the property claimed as exempt is exempt.

There is a significant difference of opinion among those courts which have considered the matter as to whether a claimed exemption that is not objected to in a timely manner by a party in interest is thereby granted in every instance.

Some courts have held that failure of any party in interest to timely object to a claimed exemption results in allowance of the exemption *as declared*. *See In re Grossman*, 80 B.R. 311 (Bankr. E.D. Pa. 1987); *In re Hawn*, 69 B.R. 567 (Bankr. E.D. Tenn. 1987); *In re Hahn*,

60 B.R. (Bank. D. Minn. 1986); *In re Kretzer*, 48 B.R. 585 (Bankr. D. Nev. 1985); *Matter of Thomas*, 43 B.R. 201 (Bankr. M.D. Ga. 1984); *Matter of Wiesner*, 39 B.R. 963 (Bankr. W.D. Wis. 1984); *Matter of Gullickson*, 39 B.R. 922 (Bankr. W.D. Wis. 1984).

Other courts have voiced concern that rigid enforcement of § 552(*l*), without further qualification, would permit what is tantamount to "exemption by declaration". They construe this subsection as implicitly containing the additional requirement that there be a statutory basis for the claimed exemption before the failure of any party in interest to timely object to it has any legal effect. *See Matter of Dembs*, 757 F.2d 777 (6th Cir. 1985); *In re Rollins*, 63 B.R. 780 (Bankr. E.D. Tenn. 1986); *In re Bennett*, 36 B.R. 893 (Bankr. W.D. Ky. 1984).

Although plausible arguments can be made in support of either of these positions, this Court is convinced that the view articulated in *In re Bennett, supra* at 894-95, is the superior view. The Court is persuaded by the explicit incorporation by reference in subsection (*l*) of the provisions of subsection (b), which limits exemptions to:

> ". . . any property that is exempt *under federal law*. . . or *state law* or *local law* that is applicable on the date of the filing of the petition."

11 U.S.C. § 522(b) (Emphasis added.)

If Debtor may select in any manner her exemptions, then no purpose is served by the inclusion of the emphasized terms. We decline to determine that

Congress inserted the terms but refused to grant them meaning.

There are also policy considerations which make the latter view the better one. The former view would encourage certain debtors of questionable integrity to claim *all* of their property as exempt, thereby leaving it to the trustee and creditors to challenge such claims. Orderly administration of such debtor's estates would be difficult, if not impossible, and uncertainty and constant litigation, if not outright chaos, would result. *See In re Bennett, supra.* The debtor could gamble that the trustee would be inept and/or negligent in fulfilling his mandated duties. If correct, the debtor would collect ill-gotten gain while his creditors suffered the loss. Again, this surely would not be the congressional intent.

Both sides have urged this Court to disregard the language of the settlement agreement in determining the precise nature of the settlement. They instead urge this Court to characterize the settlement in ways which are fanciful at best, and require leaps of imagination which the Court is unwilling to make. The only acceptable basis for determining the meaning of the settlement is found in the language used therein.

Defendants correctly point out that the value of any interest in property which a debtor wishes to exempt must be ascertained as of the date the bankruptcy petition was filed. See 11 U.S.C. § 522(a)(2). They strenuously argue that the value of the cause of action against TWA, as of October 24, 1984, was approximately $10,000.00.

Before Debtor filed her voluntary petition, the Commonwealth Court of Pennsylvania had reversed the

unfavorable decision of the Court of Common Pleas and had reinstated the favorable decision of the Commission. The Commonwealth Court of Pennsylvania determined that TWA owed the Debtor a sum of money.

In addition, although damages had not yet been determined, Debtor and her bankruptcy counsel stated on January 4, 1985, at the first meeting of creditors, that she anticipated a recovery of $90,000.00. This belies the contention made at trial that the cause of action had a value of merely $10,000.00 as of October 4, 1984.

The Court finds that the value of the cause of action on October 24, 1984 was $110,000.00. John Meyer, Esq., at the time an associate of Freeland & Kronz, testified that the attitude of his employer at that time was that their client's cause of action had great value. Over 500 hours were ultimately expended on the case. Moreover, Freeland & Kronz at no time ever suggested to their client that she settle the action for such a nominal amount of $10,000.00. That Debtor was able to realize the full value of her cause of action is further evidence of its value.

Debtor, in her Schedule B-4, refers to § 522(d) in support of the claimed exemption. In particular, she appears to rely upon U.S.C. § 522(d)(11), which exempts:

> (a) payment in compensation of loss of future earnings of the debtor . . . to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

There is no statutory basis for that portion of the $71,516.25 postpetition cash payment by TWA to

Freeland & Kronz and Debtor for ". . . tort claims or any other claims not represented (sic) wage losses". The Trustee may avoid and recover from Freeland & Kronz (as initial transferee) and Debtor (as the immediate transferee of Freeland & Kronz) $23,483.75, that portion of the settlement allocated for so-called "tort claims", plus interest at the prevailing legal rate, from the date of the initial transfer on September 17, 1987.

Defendant testified that this portion of the settlement in reality was for lost wages, but was described as being for tort claims in order to avoid payment of applicable taxes. As far as can be determined, no taxes were ever withheld or ultimately paid for this portion of the settlement. Neither Defendant can now argue that it really was for lost wages and therefore may be exempted pursuant to 11 U.S.C. § 522(d)(II). In effect, they are utilizing a knife and averring that it only cuts one way. As Defendants treated this payment as a tort recovery and failed and/or refused to pay taxes on it, this Court feels constrained to and must order that it be returned to the Trustee. There is no statutory basis permitting an exemption of this "tort recovery".

Also, Defendants are prevented by the doctrine of judicial estoppel from asserting in the present proceeding that this portion of the settlement was actually for lost wages. The doctrine of judicial estoppel is applicable at any time that a litigation plays ". . . fast and loose with the courts. . .". *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3rd Cir. 1958). According to the doctrine, "a party may be precluded by a prior position taken in litigation from later adopting an inconsistent position in the course of a judicial proceeding". *Id.* Defendants unquestionably took the position in the

previous legal action that that portion of the settlement now under discussion was for tort losses. It was to their benefit and in their interest to do so. Consequently, they cannot now be heard to maintain that it is really for lost wages. They made their choice and are bound thereto.

As has been indicated, when Debtor filed her voluntary Chapter 7 petition on October 24, 1984, she listed a total of $11,069.59 in liquidated and undisputed liabilities on Schedule A-3. Requiring Defendants to return the $23,483.75 portion of the settlement for averred tort losses will produce a *res* sufficient to pay all of Debtor's creditors, with interest, as well as the legal fees and costs incurred by counsel to the Trustee for prosecuting the present action.

Consequently, it is not necessary for this Court to also determine whether any of the remaining portions of the settlement should be returned to the Trustee. Even supposing for the moment that some or all of the remainder also should be returned, this Court declines to do so. As all of Debtor's creditors will be paid in full, the remainder ultimately would be returned to Defendants by the Trustee, after said Trustee deducted additional fees for administering the additional assets. This Court, however, is unwilling to allow the Trustee to so benefit from his own dereliction of duty and/or ignorance of bankruptcy law in failing to object in a timely fashion to Debtor's claimed exemption for the proceeds of her lawsuit against TWA. Had the Trustee

acted with knowledge and/or diligence, the present action, in all likelihood, never would have arisen.

An appropriate order will issued.

/s/ Bernard Markovitz
BERNARD MARKOVITZ
U.S. Bankruptcy Judge

Supreme Court, U.S.
FILED
NOV 4 1991
OFFICE OF THE CLERK

(2)

No. 91-571

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ROBERT J. TAYLOR, Trustee,
Petitioner,

v.

FREELAND & KRONZ, a Partnership; WENDELL G. FREELAND; and RICHARD F. KRONZ,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PHILLIP S. SIMON
(*Counsel of Record*)
KENNETH P. SIMON
SIMON & SIMON
2400 Koppers Building
Pittsburgh, PA 15219
(412) 261-3355
Counsel for the Respondents

QUESTION PRESENTED

Whether a trustee, who has never objected to the debtor's claim of exemption, may attack that claim of exemption, years after the debtor's discharge, when § 522(l) of the Bankruptcy Code provides, unless a party in interest objects, what is claimed as exempt is exempt?

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STATUTE AND RULES INVOLVED

Respondents supplement petitioner's statute and rules involved as follows.

Section 522 of the Bankruptcy Code, 11 U.S.C. § 522 (1988) provides in pertinent part:

> (a) In this section -
>
> (2) "Value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

Rule 9006(b)(3), Federal Rules of Bankruptcy Procedure, provides in pertinent part:

> (3) Enlargement Limited. The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.

STATEMENT

Respondents supplement and correct petitioner's statement of the case below.

The employment discrimination lawsuit, which the debtor claimed as exempt, began in April of 1978, when Emily Davis ("Davis" or "debtor"), through her attorney, Clenncy Cotton, filed a complaint with the Pittsburgh Commission on Human Relations ("Commission"). The case was tried before the Commission and it found in favor of Ms. Davis by order dated December 16, 1980.

The Commission ordered Trans World Airways ("TWA"), the debtor's former employer, to pay the debtor's wage loss differential from March, 1976 until the date TWA no longer employed senior sales representatives in the Pittsburgh Office. TWA was to submit information to the Commission for the calculation of wage loss (Appendix filed with the Third Circuit, hereinafter "Record on Appeal" (ROA), at 101-). TWA did not provide some of the wage information until the spring of 1987 (ROA 298-301).

TWA appealed the Commission order to the Court of Common Pleas of Allegheny County, Pennsylvania ("Common Pleas"), alleging there was insufficient evidence to support a finding of discrimination (ROA 103-111). After TWA filed its appeal to Common Pleas, Freeland & Kronz were asked to represent Ms. Davis (ROA 271-272). Wendell Freeland agreed to represent Ms. Davis for forty (40%) percent of the proceeds of

any recovery (ROA 40, 272). Common Pleas reversed the Commission's decision on liability (ROA 111). On appeal, the Commonwealth Court of Pennsylvania reversed the Common Pleas and reinstated the order of the Commission. TWA then petitioned the Supreme Court of Pennsylvania for allowance of appeal which was granted in November of 1983 (ROA 294).

As of October 24, 1984, the date of the Ms. Davis' bankruptcy filing, the case had been briefed and argued but the Supreme Court had not rendered a decision (ROA 360, 128). The Supreme Court affirmed the Commonwealth Court by an equally divided vote (ROA 128-130). Justice Hutchinson, who cast the deciding vote, stated "On the particular facts of this case I believe the evidence is sufficient, albeit barely..." to support the Commission's finding of discrimination (ROA 130).

TWA applied for reargument out of time which was subsequently allowed (ROA 139-140). Liability was finally established when, on October 1, 1986, the Supreme Court dismissed TWA's appeal (ROA 141).

After Freeland & Kronz received wage information from TWA, they submitted an "estimate of damages" to TWA in early May of 1987 (ROA 76-79). This estimate claimed losses for "back pay" (wage loss prior to May, 1987), "front pay" (wage loss from May, 1987 through June, 1990) and "pension loss." The parties held a settlement conference with Commission officials on May 15, 1987 (ROA 325-326). Commission officials believed it would be difficult for the debtor to

show an entitlement to any damages after TWA underwent substantial staff reductions in Pittsburgh in 1980 (ROA 342-343). If the Commission did not change its position on damages, Ms. Davis would be entitled to $11,219.00, excluding interest, according to Freeland & Kronz's estimate (ROA 76-79).

By August of 1987, the parties had worked out most of the details of a settlement (ROA 345). They then agreed that one-half of the payment to the debtor in the settlement would be identified as "tort recovery" (ROA 80). The settlement was formalized by a September 11, 1987 agreement which called for the payment of $23,483.75 to the debtor for "back or front pay," $23,483.75 to the debtor for alleged "tort claims and other claims not represented by wage loss," and $63,032.52 to Freeland & Kronz for "attorneys' fees," $48,032.52 in cash, and $15,000.00 "worth" of travel vouchers (ROA 82-83).

Freeland & Kronz expended almost $69,000.00 worth of legal time on the lawsuit (ROA 96-99). Approximately sixty-nine (69%) percent of this time was expended prior to the bankruptcy filing, the remaining thirty-one (31%) percent was expended post-petition. Freeland & Kronz actually received $36,500.00 in attorneys' fees plus the repayment of costs and the travel vouchers (ROA 49, 41). This sum represents payment in cash of fifty-two (52%) percent of their time expended on the case.

The debtor received $32,159.50 from TWA which passed through Freeland & Kronz's bank account (ROA

93, 41). The debtor also received $16,114.75 directly from TWA after withholding taxes were paid (ROA 93, 41).

In the trial of this case ("*Taylor*") before the United States Bankruptcy Court for the Western District of Pennsylvania ("Bankruptcy Court"), Wendell Freeland and Richard Kronz were qualified as experts and testified that the lawsuit's fair market value, as of the bankruptcy filing, was $10,000 and $5,000, respectively (ROA 357-358, 369, 131-134). The trustee presented no expert testimony on the value of the TWA lawsuit. The Bankruptcy Court found that the lawsuit had a value of $110,000.00 on October 24, 1984. App. 40a.

The trustee thought of objecting to the debtor's claim of exemption in the TWA lawsuit but did not because he thought the lawsuit would be "a nullity" - there would be no recovery (ROA 243). The trustee never objected to the claim of exemption in the TWA lawsuit.

The Bankruptcy Court issued an order, dated and entered June 28, 1991, which stated that the estate of the debtor has been fully administered and "Robert J. Taylor, Esquire is discharged as trustee of the estate...the Chapter 7 of the above-named debtor is closed." The trustee did not appeal this order. The case has not been reopened as of November 5, 1991, though the (former) trustee has filed a Motion to Vacate Case Closing Order Nunc Pro Tunc. Freeland & Kronz has objected to this Motion alleging the trustee lacks standing to request such relief.

SUMMARY OF ARGUMENT

The Court of Appeals for the Third Circuit properly construed § 552(l) of the Bankruptcy Code and Bankruptcy Rule 4003(b)(3), and held a debtor's claim of exemption is not subject to attack unless someone objects to the claim within thirty (30) days of the mandatory "§ 341 meeting." This view is supported by the clear text of the Code, its legislative history and strong policy reasons. The debtor must know what property is available for her fresh start; the trustee must know what assets to administer and distribute.

The conflict in the Circuits on this issue is minimal. The three cases offered by the petitioner to support a conflict are factually distinguishable from this case. The trustee, in *Taylor*, never objected to the claim of exemption. He did not take action against the exempt property until three years after the debtor's discharge.

This case could be resolved on other grounds. This Court could determine that Ms. Davis had a "good faith statutory basis" for her claim of exemption. The Court would have to review valuation evidence and decide state law issues to make such a determination, an inappropriate exercise of its "extraordinary jurisdiction."

This case is of limited procedural importance, may be moot and the trustee lacks standing to bring this action.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW WAS CORRECT AND JUST.

In *Taylor*, the United States Court of Appeals for the Third Circuit ("Third Circuit") held that § 522(l) of the United States Bankruptcy Code, 11 U.S.C. §101 *et seq*. (1988), ("Code") and Federal Rules of Bankruptcy Procedure 4003(b) and 9006(b)(3) ("Rules"):

> establish a strict procedure for objections to claimed exemptions. Their import is clear and they admit of no exception. Unless the trustee or another party objects to the debtor's claimed objections within a thirty-day period following the creditor's meeting or the amendment, the property claimed exempt by the debtor is exempt. No provision of the Code provides that failure to object is excused when the debtor's exemption claim is not advanced "in good faith," nor is there an exception provided for situations where a claimed exemption has only a questionable basis in Section 522(b)...Nothing in the legislative materials suggests that any exceptions to the bright line rule were intended.
>
> App. 6a, 11a.

The Third Circuit further held:

> where "the terms of a statute [are] unambiguous, judicial inquiry is complete except in rare and

> exceptional circumstances" ... where "the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters" ... a result "so bizarre that Congress 'could not have intended' it." ...
>
> This is not one of those "rare" cases.
>
> App. 10a.

The result in this case is just. Attorneys, who prosecuted a lawsuit through three appellate courts in Pennsylvania for almost seven years, should be allowed to retain their fee.

Any other result would be patently unjust. A trustee, who took no timely legal action against a debtor's claim because he thought it was a "nullity," should not be allowed to deprive the attorneys of their fees for producing a substantial recovery for their client. If the trustee doubted the basis of the exemption claim, he could have objected. If the trustee had objected, the Bankruptcy Court would have protected Freeland & Kronz's fees as a matter of course.

II. ANY CONFLICT IN THE CIRCUITS IS NOT SQUARE OR IRRECONCILABLE.

Petitioner notes that, in addition to the Third Circuit, five other Circuit Courts have commented on this issue. *Clark v. Brayshaw (In re Brayshaw)*, 912 F.2d 1255 (10th Cir. 1990); *Halverson v. Peterson (In re Peterson)*, 920 F.2d 1389 (8th Cir. 1990); *Sherk v.*

Texas Bankers Life & Loan Ins. Co. (In re Sherk), 918 F.2d 1170 (5th Cir. 1990); *In re Brandstaetter*, 767 F.2d 324 (7th Cir. 1985); *Munoz v. Dembs (In re Dembs)*, 757 F.2d 777 (6th Cir.1985).

Both *Brayshaw* and *Brandstaetter* support the Third Circuit's construction of § 522(l) of the Code and the Rules. In the two of the three remaining cases, *Dembs* and *Peterson*, the exemptions, as claimed, were allowed. *Dembs*, 757 F.2d at 781; *Peterson*, 920 F.2d at 1395. Each of these three cases, *Dembs*, *Peterson* and *Sherk*, is further distinguishable from *Taylor*.

Rule 4000(b)(3) took effect five months after debtor's claim of exemption in *Dembs*, but during the pendency of the case. The Sixth Circuit declined to apply the rule retroactively. *Dembs*, 757 F.2d at 780. The Court, in dicta, approved of the "good faith statutory basis" standard but allowed the exemption because the creditor's action against exempt property was three months after discharge. *Id.* at 781. *See also Harris v. Manufacturers National Bank of Detroit*, 457 F.2d 631 (6th Cir. 1972). In *Taylor*, the trustee did not take any action against the claimed property for three years after discharge.

In *Peterson*, the Eighth Circuit allowed the debtors' claim of a Minnesota homestead exemption in a dwelling when the debtors did not own the underlying land. The trustee's objected to the debtors' claim four days late. *Peterson*, 920 F.2d at 1390, 1395. In *Taylor*, the trustee has never objected to the debtor's claim of exemption.

In *Peterson*, the Eighth Circuit looked at whether the debtors had a "good faith statutory basis" for their claim of exemption - *not* the "merits" of the exemption. The Court reasoned that "given the liberal Minnesota homestead exemption policy and the unclear state law ... the debtors had a good faith statutory basis for their claimed exemption." *Id.* at 1394.

In *Taylor*, the petitioner assumes that the debtor did not have a "good faith statutory basis" for her claim of exemption. Ms. Davis had an absolute entitlement to $4,150.00 in "any property" under § 522(d)(5) of the Code. She also had an absolute entitlement to payments in compensation for loss of "future earnings" under § 522 (d)(11)(E) of the Code. She had an arguable basis for exempting some of the proceeds of the lawsuit for alleged "pension loss" under § 522 (d)(10)(E) of the Code.

Depending on the value of the TWA lawsuit at the bankruptcy filing, and how much was fairly attributable to "future earnings" and/or "pension loss", the TWA lawsuit should have been exempted on the "merits" of the exemption. The Bankruptcy Court's conclusion that the lawsuit was worth $110,000.00, on October 24, 1984, was a "clearly erroneous" factual finding and an inquiry into the "merits" of the exemption not sanctioned by *Peterson*, *Dembs* or *Sherk*. The Third Circuit did not reach the issue of valuation error in *Taylor*. App. 15a.

In *Sherk*, the Fifth Circuit denied the debtor's exemption claim in property that had been foreclosed

upon before bankruptcy. The Court conceded that, if the debtor had been in possession of the homestead property, he could have validly exempted it from the bankruptcy estate. *Sherk*, 918 F.2d at 1175. The Fifth Circuit held that the exemption claim was really a "fraudulent transfer" action which belonged to the trustee, not an exemption claim belonging to the debtor. *Id.* at 1175. The claim to recover the property was denied by the district court and the Fifth Circuit affirmed. *Id.* at 1173, 1178.

Section 522(l) of the Code does not allow the debtor to create an interest in property, it only allows her to exempt the interest she had as of bankruptcy. Ms. Davis had a present interest in the TWA lawsuit at the time of the bankruptcy filing, unlike the debtor in *Sherk*. The trustee did not contest the debtor's interest in the lawsuit.

III. THIS CASE COULD BE DECIDED ON OTHER GROUNDS

This case could be decided on grounds other than those asserted by the petitioner because:

(1) the trustee never objected to the claim of exemption, even after the discharge of the debtor, *see Dembs*;

(2) debtor had a present interest, at the time of the bankruptcy filing, in the property that she claimed as exempt, *see Sherk*;

(3) the debtor had a "good-faith statutory basis" for her claim of exemption in any property up to a value of $4,150 and for "future earnings" if the errors below on judicial estoppel and valuation are rectified. *See Peterson*, *Dembs* and *Sherk*.

The cases, relied on by the petitioner to show a conflict in the Circuits, are distinguishable from *Taylor*.

IV. THIS COURT WOULD BE REQUIRED TO RESOLVE EVIDENTIARY AND STATE LAW ISSUES NOT DECIDED IN THE THIRD CIRCUIT.

The Third Circuit did not resolve three issues raised by the respondents which would determine if the debtor had a "good-faith statutory basis" for her claim of exemption. The issues were:

(1) The lower courts erred as a matter of law in including attorneys' fees in the valuation of the lawsuit because (a) the pre-petition attorneys' fees were protected by an equitable lien under state law, (b) the post-petition attorneys' fees could not become property of the estate under § 541 of the Code and (c) the attorneys' fees were a separate element of the settlement;

(2) The lower court's finding that the lawsuit was worth $110,000.00, as of the bankruptcy filing, was clearly erroneous when the only competent testimony at trial valued it at nine (9%) percent of that amount; and

(3) The lower court erred in holding that Freeland & Kronz were judicially estopped from asserting that some of the lawsuit damages were for "future earnings" and "pension loss" because they characterized these damages as "tort recovery and other claims not representing wage loss" in a settlement agreement executed three years after the bankruptcy.

This Court would have to resolve these evidentiary, state law and federal common law questions in order to determine whether the debtor had a "good-faith statutory basis" for her claim of exemption. Her exemption claim had a valid statutory basis when made. The claim was valid on "the merits" years later depending on (1) lawsuit value as of October 24, 1984, (2) whether the attorneys' fees were part of the recovery, and (3) what portion of the value was attributable to "future earnings" (earnings after October 24, 1984) or "pension loss."

It would be inappropriate for a Court of "extraordinary jurisdiction" to have to resolve these issues as a prerequisite to deciding a procedural issue of limited applicability.

V. ANY CONFLICT IS MINOR AND PROCEDURAL.

The issues presented in this case, if and to what extent the time limit for objecting to claims of exemption should be extended and, if extended, what standards

should be used, are not important or substantial federal questions. This court must limit its "extraordinary jurisdiction" out of necessity to questions of more pressing substance. Conversely, it must tolerate some minor variance on procedural issues of limited applicability.

VI. THERE ARE SOUND POLICY REASONS FOR THE EXEMPTION PROCEDURE CONGRESS CREATED.

One of the primary purposes of bankruptcy is to provide a "fresh start" to debtors. *Perez v. Campbell*, 402 U.S. 637, 649, 91 S.Ct. 1704, 1706, 29 L.Ed 2d 233, 241 (1971). The purpose of exempt property is to allow the debtor to retain a minimal amount of property for his "fresh start." *Van Iperen v. Production Credit Assn. of Worthington-Slayton Branch (In re Van Iperen)*, 819 F.2d 189 (8th Cir. 1987); *see*, *In re Hindman*, 104 F. 331 (9th Cir. 1900). The exemption procedure Congress created with § 522(l) of the Code and Bankruptcy Rule 4003(b)(3) offers certainty and finality which is particularly acute in the bankruptcy context. App. 12a.

The debtor must begin his "fresh start" and must know what property he has available for that purpose. The trustee must administer assets according to the Bankruptcy Code. The procedural rules make imminently good sense, given the framework which the Code establishes for administering assets of the estate. *Doyle v. Grossman (In re Grossman)*, 80 B.R. 311, 314 (Bankr. E.D.Pa. 1987).

In *Brandstaetter*, the Seventh Circuit expressed another policy concern applicable in *Taylor*:

> It would be questionable policy to allow the trustee to hang back while the debtor goes forward with his ... claim and then subsequently object to the inclusion of these claims in exempt property.

Brandstaetter, 767 F.2d at 328.

Courts that have opted for the "good faith statutory basis" standard have ignored the policies of certainty and finality, necessary to give the debtor a true "fresh start."

VII. THIS CASE MAY BE MOOT; ROBERT TAYLOR LACKS STANDING TO MAINTAIN THIS ACTION.

The Bankruptcy Court issued an order, dated and entered June 28, 1991, which discharged Robert J. Taylor, Esquire as trustee of the estate of Emily Davis and ordered the case of the debtor closed. The trustee did not appeal the case closing order. The case has not been reopened, however, the former trustee's counsel has filed a motion to vacate the case closing order nunc pro tunc.

Respondents have objected to this motion on various grounds, including that Robert Taylor has no standing to request such relief. It is the duty of the Office of the United States Trustee, under § 703(c) of

the Code, to appoint a successor trustee if a trustee is needed in a reopened case under § 350 of the Code.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

PHILLIP S. SIMON
(*Counsel of Record*)
KENNETH P. SIMON
SIMON & SIMON
2400 Koppers Building
Pittsburgh, PA 15219
(412) 261-3355

Counsel for the Respondents

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No. 91-571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT J. TAYLOR, Trustee,

Petitioner,

v.

FREELAND & KRONZ, a Partnership; WENDELL G. FREELAND; and RICHARD F. KRONZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

GARY W. SHORT
Suite 2317, Koppers Building
Grant Street & Seventh Avenue
Pittsburgh, Pennsylvania 15219
(412) 765-0100

TIMOTHY B. DYK
(Counsel of Record)
PATRICK J. POTTER
STEPHEN J. GOODMAN
DARRYL R. MARSCH
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939
PETER M. LIEB
JONES, DAY, REAVIS & POGUE
599 Lexington Avenue
New York, New York 10022
(212) 326-3939
Counsel for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-57

ROBERT J. TAYLOR, Trustee,

Petitioner,

v.

FREELAND & KRONZ, a Partnership;
WENDELL G. FREELAND; and
RICHARD F. KRONZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

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1. Respondents concede that there is a "conflict in the Circuits on th[e] issue . . . " presented by the Petition, but claim that the conflict is "minimal" because the decisions of the Fifth, Sixth, and Eighth Circuits are "factually distinguishable" from the present case. Opp. at

6. However, as the court below (the Third Circuit) acknowledged, its holding plainly and simply "disagree[d] with the conclusion reached . . . by the Courts of Appeals for the Sixth and Eighth Circuits." Appendix to the Petition for Certiorari ("App.") at 8a-9a.[1]

The court below held that if neither the trustee nor any other party in interest files an objection to a claimed exemption within the thirty-day period specified by Bankruptcy Rule 4003(b), the exemption must be allowed, regardless of whether there was any legal basis for claiming it. App. 9a, 15a. Conversely, the Fifth, Sixth, and Eighth Circuits have held that even if a timely objection is not filed, the claimed exemption should not be allowed unless there was "a good-faith statutory basis" for claiming it.

Respondents claim that the Fifth Circuit's decision in *Sherk* is "distinguishable" because the Fifth Circuit, in finding that there was no good-faith statutory basis for the exemption claimed by the debtor in that case, relied upon the fact that the debtor did not have possession of the disputed property. Opp. 10-11; 918 F.2d at 1175-1176. But the conflict between the Fifth Circuit's decision and the decision of the court below lies in the fact that the Fifth Circuit required the debtor to have a good-faith basis for the claimed exemption, not in the specific details of why such a basis did or did not exist. *See* 918 F.2d at 1174.

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[1] The court below was evidently unaware, at the time that it decided this case, of the Fifth Circuit's decision in *Sherk v. Texas Bankers Life & Loan Ins. Co. (In re Sherk)*, 918 F.2d 1170, 1174 (5th Cir. 1990).

Respondents also claim that the Eighth Circuit's decision in *Halverson v. Peterson* (*In re Peterson*), 920 F.2d 1389 (8th Cir. 1990) is distinguishable because (1) in that case, the exemption was ultimately allowed and (2) because the trustee in that case was more prompt in objecting to the exemption claimed by the debtor. Opp. at 9. However, it is irrelevant that the Eighth Circuit in *Peterson* found that there was a good-faith statutory basis for the exemption claimed in that case (920 F.2d at 1394); the point is that (unlike the court below) the Eighth Circuit would not have allowed the exemption unless the debtor had a good-faith basis for claiming it. 920 F.2d at 1393-1394. Nor is it relevant that the trustee in *Peterson* filed his objection to the claimed exemption "only" four days late; the point is that, like Taylor, the trustee in *Peterson* failed to file a formal objection within the thirty-day period.[2] Moreover, Taylor, the trustee in the present case, specifically advised respondents just *three* days after the creditor's meeting (and thus well within the thirty-day period) that he considered the net proceeds of Davis' lawsuit to be an asset of the bankruptcy estate. Petition for Certiorari 11 (citing ROA 73). Thus, although Taylor failed to file a formal objection at that time, it is disingenuous for respondents to suggest that he "has never objected to the debtor's claim of exemption." Opp. 9.

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[2] Indeed, the only reason that the trustee in *Peterson* was so "prompt" in filing his formal objection was that the debtors informed him, on the thirtieth day of the thirty-day period, that the thirty-day period had expired. 920 F.2d at 1390. Taylor did not receive any such notification in this case.

Finally, in *Munoz v. Dembs* (*In re Dembs*), 757 F.2d 777 (6th Cir. 1985), the Sixth Circuit clearly held, contrary to the decision of the court below, that exemptions will not be allowed, even when no timely objection is filed, unless there is "a good-faith statutory basis for exemption . . . " *Id.* at 780. While respondents characterize this holding as "dicta" (Opp. 9), at least two federal courts of appeals have expressly recognized *Dembs* as the law of the Sixth Circuit. *See Peterson*, 920 F.2d 1389, 1393 (8th Cir. 1990) ("This approach [requiring a good-faith statutory basis for the claimed exemption] originated in *Munoz v. Dembs* (*In re Dembs*)."); *Taylor*, App. 8a ("[t]wo federal courts of appeals have adopted [the middle-ground] approach.") (citing *Peterson* and *Dembs*).

In short, there is a clear conflict among the circuits on this important and recurrent issue. Only this Court can resolve that conflict and provide the necessary uniformity in the administration of the Bankruptcy Code.

2. Respondents also claim that this case is "moot" because the bankruptcy court "discharged" the trustee (Taylor) on June 28, 1991. Opp. 15-16. However, that claim is frivolous. It was never the intention of the bankruptcy court to discharge the trustee, and indeed that court has recently vacated the so-called order of discharge *nunc pro tunc*.

On June 26, 1991, the bankruptcy court entered an order closing the case "pending resolution of . . . " the instant action. Amended Order of Court, June 26, 1991 (attached hereto as Appendix A). That order specifically stated that "[t]he Trustee reserves the right to prosecute

the action and administer any fund generated as a result of the appeal, and distribute such fund to creditors in accordance with the provisions of the Bankruptcy Code. Such closing of the case shall in no way be deemed an abandonment of the action or of the lawsuit proceeds." *Id.* However, as a result of a clerical error, an order was issued two days later which erroneously stated that "[t]he estate of the above named debtor has been fully administered" and that the trustee was therefore "discharged." Taylor subsequently filed a motion to vacate that order, and the bankruptcy court, after admitting that it had never intended to discharge the trustee and stating that it intended to correct its own error, vacated the orders closing the case and discharging the trustee, *nunc pro tunc*, as of June 26, 1991. Order of Court, November 5, 1991 (attached hereto as Appendix B).[3]

3. The issue presented by this case--whether a debtor may obtain a groundless exemption solely because no party in interest filed a formal objection within the time allotted by Bankruptcy Rule 4003(b)--is an issue of importance in any individual Chapter 7 bankruptcy. As noted in the Petition, it has received an extraordinary amount of attention in the lower federal courts and has been fiercely debated for over seven years. Petition for Certiorari 15-18. Six federal courts of appeals have

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[3] The bankruptcy court's comments about the original order are contained in an audio tape of the hearing on the Motion to Vacate which took place on November 5, 1991. Counsel for petitioner have a copy of the tape.

divided evenly over how it should be resolved. *Id.* There is no good reason for delaying this Court's consideration of the issue.

In 1989 alone, over 420,000 individual Chapter 7 cases were filed in the federal courts. Petition for Certiorari 20. Given the current state of the economy, that number can only be expected to increase. It is therefore important that this Court now act to resolve the conflict among the circuits as to whether debtors are to be rewarded for claiming groundless and fraudulent exemptions.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

GARY W. SHORT
Suite 2317
Koppers Building
Grant Street & Seventh Avenue
Pittsburgh, PA 15219
(412) 765-0100

TIMOTHY B. DYK
(Counsel of Record)
PATRICK J. POTTER
STEPHEN J. GOODMAN
DARRYL R. MARSCH
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
PETER M. LIEB
JONES, DAY, REAVIS & POGUE
599 Lexington Avenue
New York, NY 10022
(212) 326-3939

November 1991

APPENDICES

Appendix A

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF PENNSYLVANIA

In Re:	:	Bankruptcy No. 84-2291
	:	Adversary No. 88-446
EMILY DAVIS, a/k/a	:	Motion No. 91-3573M
EMILY WINN,	:	Chapter 7
	:	

AMENDED ORDER OF COURT

AND NOW at Pittsburgh in said District this 26th day of June, 1991, after notice and hearing on the above-captioned matter, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The case is closed pending resolution of the Trustee's pending motion for judgment and to proceed to execution against assets of the debtor, and the Trustee's action as defined below.

2. In the event that the Trustee prevails in the Third Circuit Court Appeals in the Complaint to A oid Post-petition transfers Under 11 U.S.C. Sec. 549 and Sec. 550. (The Action), the Trustee will file a Motion to Reopen the above-referenced case.

The Trustee reserves the right to prosecute the action and administer any fund generated as a result of the appeal, and distribute such fund to creditors in accordance with the provisions of the Bankruptcy Code.

Such closing of the case shall in no way be deemed an abandonment of the action or of the lawsuit proceeds.

BY THE COURT:

/s/ Bernard Markovitz

Appendix B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

In Re:	Bankruptcy No. 84-2291 BM
EMILY DAVIS, a/k/a EMILY WINN,	
Debtor,	Chapter 7
ROBERT J. TAYLOR, Trustee,	
Movant,	
vs.	Motion No. 91-7117M
FREELAND & KRONZ, a partnership; WENDELL G. FREELAND, RICHARD F. KRONZ; and EMILY DAVIS,	
Respondents.	

ORDER OF COURT

AND NOW, to-wit, this 5th day November, 1991, upon consideration of the Trustee's Motion for Relief

from Orders Closing Case and Discharging Trustee, after notice and hearing, it is hereby ORDERED that:

1. The Order entered June 26, 1991, closing the Chapter 7 proceeding of Emily Davis a/k/a Emily Winn, Bankruptcy No. 84-2291 is hereby vacated *nunc pro tunc* as of June 26, 1991;

2. The Order discharging Robert J. Taylor as Trustee is hereby vacated *nunc pro tunc* as of June 26, 1991; and

3. The Trustee is hereby authorized to proceed in execution against assets of the Debtor.

/s/ Bernard Markovitz
United States Bankruptcy Court

(4)

No. 91 - 571

FILED
JAN 13 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT J. TAYLOR, Trustee,

Petitioner,

v.

FREELAND & KRONZ, a Partnership; WENDELL G. FREELAND; and RICHARD F. KRONZ,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Curcuit

JOINT APPENDIX

TIMOTHY B. DYK
(Counsel of Record)
PATRICK J. POTTER
STEPHEN J. GOODMAN
DARRYL R. MARSCH
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939
PETER M. LIEB
JONES, DAY, REAVIS
& POGUE
599 Lexington Avenue
New York, New York 10022
(212) 326-3939

GARY W. SHORT
Suite 2317, Kopper Building
Grant Street & Seventh Avenue
Pittsburgh, PA 15219
(412) 765-0100

Counsel for Petitioner

PHILLIP S. SIMON
(Counsel of Record)
KENNETH P. SIMON
SIMON & SIMON
2400 Koppers Building
Pittsburgh, PA 15219
(412) 261-3355

Counsel for Respondents

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RELEVANT DOCKET ENTRIES

I. United States Bankruptcy Court for the Western District of Pennsylvania

1.	October 4, 1988	–	Complaint filed
2.	November 23, 1988	–	Answer of Freeland, Kronz, and Freeland & Kronz to Complaint filed
3.	November 23, 1988	–	Response and New Matter of Emily Davis to Complaint filed
4.	June 20, 1989	–	Plaintiff's Pretrial Statement filed
5.	June 23, 1989	–	Defendant Emily Davis' Pretrial Statement filed
6.	June 26, 1989	–	Defendants Freeland, Kronz, and Freeland & Kronz's Pretrial Statement filed
7.	June 28, 1989	–	Defendant Freeland & Kronz's Motion for Summary Judgment filed
8.	June 29, 1989	–	Combined Pretrial Statement of the Parties filed
9.	July 3, 1989	–	Response in Opposition to Motion for Summary Judgment filed
10.	July 5, 1989	–	Trial
11.	September 7, 1989	–	Memo Opinion and Order filed
12.	September 15, 1989	–	Notice of Appeal filed

II. United States District Court for the Western District of Pennsylvania

1. September 7, 1989 – Memorandum Opinion affirming Judgment of Bankruptcy Court filed
2. October 3, 1989 – Notice of Appeal filed

III. United States Court of Appeals for the Third Circuit

1. July 8, 1991 – Opinion filed

IV. United States Supreme Court

1. November 27, 1991 – Petition for Writ of Certiorari granted

PITTSBURGH COMMISSION ON HUMAN RELATIONS
Pittsburgh, PA

EMILY E. DAVIS WINN,	)	
	)	
Complainant	)	
	)	
vs.	)	FEP B-262
	)	
TRANS WORLD AIRLINES, INC.,	)	
	)	
Respondent	)	

ORDER

AND NOW, this 16th day of December, 1980, it is hereby ordered that Respondent, Trans World Airlines, Inc. cease and desist from discriminating against any of its employees on the basis of their sex or race,

AND FURTHER, that the Respondent immediately pay to the Complainant, Emily E. Davis Winn, lost wages representing the difference between her salary as a Reservations Sales Representative and the salary of a Senior Sales Representative, the position she was denied because of unlawful discrimination from the period March, 1976 until the date TWA no longer employed Senior Sales Representatives in its Pittsburgh office.

Respondent is to submit information to the Commission for the calculation of lost wages, including but not limited to, Winn's wages from 1976 and the wages of Senior Sales Representatives in the Pittsburgh area from 1976.

Hearing Commissioners Bingler and Silverman concur in this Decision and Order.

BY THE COMMISSION:

By: /s/ Marsha Bingler
Marsha Bingler, Chairperson

UNITED STATES BANKRUPTCY COURT

for the Western District of Pennsylvania

IN RE EMILY E. DAVIS a/k/a)
EMILY E. WINN,) Case No. _____

Debtor [include here all names used by Debtor within last 6 years]

SCHEDULE A. - STATEMENT OF ALL LIABILITIES OF DEBTOR

Schedules A-1, A-2 and A-3 must include all the claims against the debtor or his property as of the date of the filing of the petition by or against him.

SCHEDULE A-1. - CREDITORS HAVING PRIORITY

(1) Nature of Claim	(2) Name of creditor and complete mailing address including zip code (if unknown, so state)	(3) Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, or subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt	(4) Indicate if claim is contingent, unliquidated or disputed	(5) Amount of claim	
				$	Cts.
(a) Wages, salary, and commissions, including vacation, severance and sick leave pay owing to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part					

SCHEDULE A-1. - CREDITORS HAVING PRIORITY

(1) Nature of Claim	(2) Name of creditor and complete mailing address including zip code (if unknown, so state)	(3) Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, or subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt	(4) Indicate if claim is contingent, unliquidated or disputed	(5) Amount of claim
time, whether or not selling exclusively for the debtor, not exceeding $2,000 to each, earned within 90 days before filing of petition or cessation of business, if earlier (specify date).				0 00
(b) Contributions to employee benefit plans for services rendered within 180 days before filing of petition or cessation of business if earlier (specify date).				0 00

(c) Deposits by individuals, not exceeding $900 for each for purchase, lease, or rental of property or services for personal, family, or household use that were not delivered or provided.	0	00
(d) Taxes Owing [itemize by type of tax and taxing authority]		
(1) To the United States	200	78
(2) To any state	0	00
(3) To any other taxing authority	0	00
Total	200	78

UNITED STATES BANKRUPTCY COURT

for the Western District of Pennsylvania

IN RE EMILY E. DAVIS a/k/a)
EMILY E. WINN,)

Case No. _____

Debtor [include here all names used by Debtor within last 6 years]

SCHEDULE A-2. - CREDITORS HOLDING SECURITY

(1) Name of creditor and complete mailing address including zip code [if unknown, so state]	(2) Description of security and date when obtained by creditor	(3) Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed or subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt	(4) Indicate if claim is contingent, unliquidated or disputed.	(5) Market Value		(6) Amount of claim without deduction of value of security	
				$	Cts.	$	Cts.
N/A				0	00	0	00
Total				0	00	0	00

∞

UNITED STATES BANKRUPTCY COURT

for the Western District of Pennsylvania

IN RE EMILY E. DAVIS a/k/a)
EMILY E. WINN,)

Case No. _____

Debtor [include here all names used by Debtor within last 6 years]

SCHEDULE A-3. - CREDITORS HAVING UNSECURED CLAIMS WITHOUT PRIORITY

Name of creditor [including last known holder of any negotiable instrument] complete mailing address including zip code [if unknown, so state]	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt	Amount of claim $	Cts.
Amoco Oil Co. PO Box 9014 Des Moines, IA 50306	Merchandise & services - liquidated and undisputed	1,049	76
Firestone Tire & Rubber Co PO Box 81344 Cleveland, OH 44188	Merchandise & services - liquidated and undisputed	80	13
Gimbels 339 Sixth Ave Pittsburgh, PA 15284	Merchandise - liquidated and undisputed	340	76

Name of creditor [including last known holder of any negotiable instrument] complete mailing address including zip code [if unknown, so state]	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt	Amount of claim	
Herman Gordon, D.D.S. Chatham Center Prof'l, Suite 1D Pittsburgh, PA 15219	Services - liquidated and undisputed	186	00
Joseph Horne's Credit Dept Pittsburgh, PA 15285	Merchandise - liquidated and undisputed	317	95
Kaufmann's PO Box 1118 Pittsburgh, PA 15230	Merchandise - liquidated and undisputed	301	80
Mellon Bank c/o Charge Services PO Box 371322M Pittsburgh, PA 15250	Merchandise, services and money loaned on MasterCard - liquidated and undisputed	4,673	24
Northwest Financial 5519 Walnut St Pittsburgh, PA 15232	Money loaned - liquidated and undisputed	2,640	00
Total		9,589	64

UNITED STATES BANKRUPTCY COURT

for the Western District of Pennsylvania

IN RE EMILY E. DAVIS a/k/a)
EMILY E. WINN,)
Debtor

Case No. _____

SCHEDULE A-3. - CREDITORS HAVING UNSECURED CLAIMS WITHOUT PRIORITY

Creditor	Specifications	Amount $	Amount Cts.
JC Penney 7 Parkway Center Pittsburgh, PA 15262	Merchandise - liquidated and undisputed	109	86
People's Natural Gas Co 1201 Pitt St Pittsburgh, PA 15221	Services - liuqidated & undisputed	257	19
Sewickley Valley Hosp Blackburn Road Sewickley, PA 15143	Services - liquidated and undisputed	53	25
US Air Fed'l Credit Union; Grtr Pgh Airport Pittsburgh, PA 15231	Money loaned - liquidated and undisputed	500	00
Wickes Furniture Monroeville, PA 15146	Merchandise - liquidated and undisputed	559	65
Total		11,069	59

UNITED STATES BANKRUPTCY COURT

for the Western District of Pennsylvania

IN RE EMILY E. DAVIS a/k/a)
EMILY E. WINN,) Case No. _____

Debtor [include here all names used by Debtor within last 6 years]

SCHEDULE B. - STATEMENT OF ALL PROPERTY OF DEBTOR

Schedules B-1, B-2, B-3 and B-4 must include all property of the debtor as of the date of the filing of the petition by or against him.

SCHEDULE B-1. - REAL PROPERTY

Description and location of all real property in which debtor has an interest [including equitable and future interests, interests in estates by the entirety, community property, life estates, leaseholds, and rights and powers reversible for his own benefit]	Nature of interest [specify all deeds and written instruments relating thereto]	Market value of debtor's interest without deduction for secured claims listed in Schedule A-2 or exemptions claimed in Schedule B-4	
		$	Cts.
N/A		0	00
Total		0	00

UNITED STATES BANKRUPTCY COURT

for the Western District of Pennsylvania

IN RE EMILY E. DAVIS a/k/a)
EMILY E. WINN,) Case No. _____

Debtor [include here all names used by Debtor within last 6 years]

SCHEDULE B-2. - PERSONAL PROPERTY

Type of Property	Description and Location	Market value of debtor's interest without deduction for secured claims listed on Schedule A-2 or exemptions claimed in Schedule B-4	
		$	Cts.
a. Cash on hand		100	00
b. Deposits of money with banking institutions, savings and loan associations, credit unions, public utility companies, landlords and others		100	00
c. Household goods, supplies, and furnishings		750	00
d. Books, pictures and other art objects; stamp, coin and other collecions		0	00
e. Wearing apparel, jewelry, firearms, sports equipment, and other personal possessions		500	00

SCHEDULE B-2. - PERSONAL PROPERTY

Type of Property	Description and Location	Market value of debtor's interest without deduction for secured claims listed on Schedule A-2 or exemptions claimed in Schedule B-4	
f. Automobiles, trucks, trailers and other vehicles	1976 Plymouth	300	00
g. Boats, motors, and their accessories		0	00
h. Livestock, poultry, and other animals		0	00
i. Farming supplies and implements		0	00
j. Office equipment, furnishings, and supplies		0	00
k. Machinery, fixtures, equipment, and supplies (other than those listed in items j. and i.) used in business		0	00
l. Inventory		0	00
m. Tangible personal property of any other description		0	00
n. Patents, copyrights, franchises, and other general intangibles (specify all documents and writings relating thereto)		0	00

o. Government and corporate bonds and other negotiable and non-negotiable instruments		0	00
p. Other liquidated debts owing debtor		0	00
q. Contingent and unliquidated claims of every nature, including counterclaims of the debtor (give estimated value of each)		0	00
r. Interests in insurance policies (itemize surrender or refund values of each)		0	00
s. Annuities		0	00
t. Stock and interests in incorporated and unincorporated companies (itemize separately)		0	00
u. Interests in partnerships		0	00
v. Equitable and future interests. Life estates and rights or powers excercisable for the benefit of the debtor (other than those listed in Schedule B1) (specify all written instruments relating thereto)	Proceeds from lawsuit - Winn v. TWA, if any	unknown	
Total		1750	00

UNITED STATES BANKRUPTCY COURT

for the Western District of Pennsylvania

IN EMILY E. DAVIS a/k/a)
EMILY E. WINN,) Case No. _____

Debtor [include here all names used by Debtor within last 6 years]

SCHEDULE B-3. - PROPERTY NOT OTHERWISE SCHEDULED

Type of Property	Description and Location	Market value of debtor's interest without deduction for secured claims listed on Schedule A-2 or exemptions claimed in Schedule B-4	
		$	Cts.
a. Property transferred under assignment for benefit of creditors within 120 days prior to filing of petition (specify date of assignment, name and address of assignee, amount realized therefrom by the assignee, and disposition of proceeds so far as known to debtor).		0	00
b. Property of any kind not otherwise scheduled.		0	00
Total		0	00

UNITED STATES BANKRUPTCY COURT

for the Western District of Pennsylvania

IN RE EMILY E. DAVIS a/k/a)
EMILY E. WINN,) Case No. _____

Debtor [include here all names used by Debtor within last 6 years]

Debtor selects the following property as exempt pursuant to 11 U.S.C. §§: 522(d) [or the laws of the State of _____]

SCHEDULE B-4. - PROPERTY CLAIMED AS EXEMPT

Type of Property	Location, description, and, so far as relevant to the claim of exemption, present use of property	Specify statute creating the exemption	Value Claimed Exempt $	Cts.
Cash on hand		11 U.S.C. 522(d)	100	00
Checking account -	Mellon Bank	11 U.S.C. 522(d)	100	00
Household goods and furnishings;	1720 Pierce Street Aliquippa, PA 15001	11 U.S.C. 522(d)	750	00
Wearing apparel and jewelry;	1720 Pierce Street Aliquippa, PA 15001	11 U.S.C. 522(d)	500	00
1976 Plymouth;	1720 Pierce Street Aliquippa, PA 15001	11 U.S.C. 522(d)	300	00

SCHEDULE B-4. - PROPERTY CLAIMED AS EXEMPT

Type of Property	Location, description, and, so far as relevant to the claim of exemption, present use of property	Specify statute creating the exemption	Value Claimed Exempt	
			$	Cts.
Proceeds from lawsuit -	Winn v. TWA Claim for lost wages	11 U.S.C. 522(b)(d)	unknown	
Total			1750	00

UNITED STATES BANKRUPTCY COURT

for the Western District of Pennsylvania

IN RE EMILY E. DAVIS a/k/a)
EMILY E. WINN,)

Case No. _____

Debtor [include here all names used by Debtor within last 6 years]

UNSWORN DECLARATION UNDER PENALTY OF PERJURY OF INDIVIDUAL TO SCHEDULES A AND B

I, EMILY E. DAVIS a/k/a EMILY E. WINN, certify under penalty of perjury that I have read the foregoing schedules consisting of _____, sheets, and that they are true and correct to the best of my knowledge, information, and belief.

Executed on Oct. 24, 1984

Signature /s/ Emily E. Davis a/k/a Emily E. Winn

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UNSWORN DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF CORPORATION OR PARTNERSHIP TO SCHEDULES A AND B

I, _____, [the president or other officer or authorized agent of the corporation] [or a member or an authorized agent of the partnership] named as debtor in this case, certify under penalty of perjury that I have read the foregoing schedules, consisting of _____ sheets and that they are true and correct to the best of my knowledge, information and belief.

Executed on _____

Signature _____

UNITED STATES BANKRUPTCY COURT

for the Western District of Pennsylvania

IN RE EMILY E. DAVIS a/k/a)
EMILY E. WINN,) Case No. _____

Debtor [include here all names used by Debtor within last 6 years]

SUMMARY OF DEBTS AND PROPERTY

[From the statements of the debtor in Schedules A and B]

Schedule		Total
A-1/a.b	Wages, etc. having priority	0.00
A-1(c)	Deposits of money	0.00
A-1/d(1)	Taxes owing United States	200.78
A-1/d(2)	Taxes owing states	0.00
A-1/d(3)	Taxes owing other taxing authorities	0.00
A-2	Secured claims	0.00
A-3	Unsecured claims without priority	11,069.59
	SCHEDULE A TOTAL	
	PROPERTY	11,270.37
B-1	Real property (total value)	0.00

B-2/a	Cash on hand	100.00
B-2/b	Deposits	100.00
B-2/c	Household goods	750.00
B-2/d	Books, pictures, and collections	0.00
B-2/e	Wearing apparel and personal possessions	500.00
B-2/f	Automobiles and other vehicles	300.00
B-2/g	Boats, motors, and accessories	0.00
B-2/h	Livestock and other animals	0.00
B-2/i	Farming supplies and implements	0.00
B-2/j	Office equipment and supplies	0.00
B-2/k	Machinery, equipment, and supplies used in business	0.00
B-2/l	Inventory	0.00
B-2/m	Other tangible personal property	0.00
B-2/n	Patents and other general intangibles	0.00
B-2/o	Bonds and other intruments	0.00
B-2/p	Other liquidated debts	0.00
B-2/q	Contingent and unliquidated claims	0.00
B-2/r	Interests in insurance policies	0.00
B-2/s	Annuities	0.00
B-2/t	Interests in corporations and unincorporated companies	0.00
B-2/u	Interests in partnerships	0.00
B-2/v	Equitable and future interests, rights, and powers in personality	unknown
B-3/a	Property assigned for benefit of creditors	0.00
B-3/b	Property not otherwise scheduled	0.00
	SCHEDULE B TOTAL	1,750.00

[J#40-84]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

EMILY E. DAVIS WINN,	: No. 79 W.D. Appeal Docket, 1983
Appellee	: Appeal from the June 27, 1983 of the Commonwealth Court at No. 2651 C.D. 1981, reversing the Order of the Court of Common Pleas, Civil Division, of Allegheny County at No. S.A. 5 of 1981, dated September 23, 1981.
v.	
TRANS WORLD AIRLINES, INC.,	
Appellant	: 75 Pa. Commonwealth Ct. 366, 462 A.2d 301 (1983).
	: ARGUED: March 6, 1984

ORDER

PER CURIAM FILED: NOVEMBER 29, 1984

The Court being equally divided, the Order of the Commonwealth Court is affirmed.

MR. JUSTICE PAPADAKOS did not participate in the consideration or the decision of this matter.

MR. CHIEF JUSTICE NIX files an Opinion in Support of Affirmance in which MR. JUSTICE LARSEN joins.

MR. JUSTICE LARSEN files an Opinion in Support of Affirmance in which MR. CHIEF JUSTICE NIX joins.

MR. JUSTICE HUTCHINSON files an Opinion in Support of Affirmance.

MR. JUSTICE FLAHERTY files an Opinion in Support of Reversal in which MR. JUSTICE McDERMOTT and MR. JUSTICE ZAPPALA join.

[J#40-84]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

EMILY E. DAVIS WINN,	: No. 79 W.D. Appeal Docket, 1983
Appellee	: Appeal from the June 27, 1983 of the Commonwealth Court at No. 2651 C.D. 1981, reversing the Order
v.	: of the Court of Common Pleas, Civil Division, of Allegheny County at
TRANS WORLD AIRLINES, INC.,	: No. S.A. 5 of 1981, dated September 23, 1981.
Appellant	: 75 Pa. Commonwealth Ct. 366, 462 A.2d 301 (1983).
	: ARGUED: March 6, 1984

OPINION IN SUPPORT OF AFFIRMANCE

HUTCHINSON, J. FILED: NOVEMBER 29, 1984

On the particular facts of this case I believe the evidence is sufficient, albeit barely, to support the Pittsburgh Human Relations Commission's findings of discrimination in three of the five matters of which appellee complained. I therefore believe Commonwealth Court must be affirmed. However, because the precedential value of this case is limited to its facts, I would dismiss the appeal as improvidently granted.

PROCEEDING MEMO - §341 MEETING

DATE: Jan. 4, 1985 9:00 a.m.

TITLE: In re: Emily E. Davis
Emily Winn ss# 208-32-8179
Case No.: 84-2291

1. Disclosure statement filed by attorney for debtor pursuant to 11 U.S.C. §329 and FRBP 219(b)-

___ Yes
___ No

2. Trustee - ___ Interim trustee continued
___ Trustee elected by creditors
___ Name of trustee:

3. Trustee election disputed ___ Yes
___ No

[Interim Bankruptcy Rule 2003: *If an election is disputed, the presiding officer shall promptly inform the court in writing of the dispute. Pending disposition of the dispute by the court, the interim trustee shall continue in office.*]

4. If trustee election disputed, were parties to the dispute advised by the presiding officer of the 10 day time limitation for application to the court?

___ Yes ___ No

5. Creditors' committee elected pursuant to 11 U.S.C. §705

___ Yes ___ No

[*If a creditor's committee was elected, attach the list of membership*]

6. Debtor examined by- ___ Creditor(s) ___ Indenture trustee ___ Trustee or Examiner

7. Should claims be filed? ___ Yes ___ No

8. Meeting adjourned to , 19 , .m.

Notes of Presiding Officer (Handwritten notes)

Alan Berman & Debtor Appeared

Creditors Appeared 1. (illegible) Dave Wahland, Northwest Financial, 5519 Walnut St., Pittsburgh, Pa 15232, 621-9200.

1. No 1984 income tax refund - she'll owe money
2. No real estate
3. 1976 Plymouth - $300.00 value
4. Pending lawsuit with TWA - possible claim $90,000.00. On appeal to Pa. Supreme Court Possible asset case

/s/ Robert J. Taylor
Presiding Officer

Robert J. Taylor
Attorney at Law
337 Merchant Street
Ambridge, Pennsylvania 15003

(412) 266-2370

January 7, 1985

Richard F. Kronz, Esq.
Wendell Freeland, Esq.
1111 Manor Building
564 Forbes Avenue
Pittsburgh, PA 15219

In Re: Emily E. Davis, a/k/a Emily E. Winn v. TWA
Bankruptcy No. 84-2291

Dear Mr. Kronz and Mr. Freeland:

I am the appointed Trustee in the bankruptcy of Emily E. Davis, a/k/a Emily E. Winn at No. 84-2291.

At the interim Trustee hearing which was held January 4, 1985, she and her attorney, Alan Berman, advised that you were handling her suit against TWA.

Kindly supply the details of the suit, the possibility of settlement and what the approximate amount the settlement would be. As you are aware, the net proceeds of said suit would be an asset in the bankruptcy estate. Please advise the details.

Very truly yours,

Robert J. Taylor

Freeland & Kronz
Attorneys at Law
Eleven-Eleven Manor Building
Pittsburgh, Pennsylvania 15219
(412) 471-5287

January 9, 1985

Robert J. Taylor, Esquire
337 Merchant Street
Ambridge, Pennsylvania 15003

Re: Emily E. Davis vs. TWA

Dear Mr. Taylor:

In November, 1984, a split Supreme Court affirmed the decision of the Commonwealth Court which resulted in a final adjudication on the liability aspect of the charge initially brought with the Pittsburgh Commission on Human Relations. The damages or the back pay aspect of this case has never been tried because TWA took its appeal before the Commission had the opportunity to review relevant wage records. Therefore, there is no way of ascertaining the value of the case to Ms. Winn other than by calculating the back pay together with prejudgment interest, since the date of her layoff.

We have calculated the back pay and interest at approximately $110,000.00. However, while we are guardedly optimistic that the case can be settled on the basis of a mutually agreeable formula, we expect that we will have to go back before the Commission to try the damages to conclusion. In this regard, we have requested the Commission to reconvene the proceedings and we are preparing to try this aspect of the case.

Because we expect TWA to vigorously defend the back pay issue and because of the slowness of the process at the Commission level and because of other variables and

uncertainties, the possibility of a quick settlement is unlikely. Furthermore, we do not expect that Ms. Winn will receive any money, whether by settlement or by verdict, in the year 1985.

I hope this letter has been of some help to you. If I may be of any further assistance, please feel free to call.

Very truly yours,

/s/John A. Meyer
John A. Meyer

Freeland & Kronz
Attorneys at Law
Eleven-Eleven Manor Building
Pittsburgh, Pennsylvania 15219
(412) 471-5287

Wendell G. Freeland
Richard F. Kronz

Craig A. McClean
Margaret M. Hock

May 12, 1987

James A. Mollica, Jr., Esq.
MEYER, DARRAGH, BUCKLER,
BEBENEK & ECK
2000 Frick Building
Pittsburgh, Pennsylvania 15219

Dear Jim:

RE: Davis v. TWA

Per your request, we are submitting a revised work up of the damages sustained by Winn-Davis.

In making our calculations, we used information contained in the materials we sent you and you sent us. In computing back pay, we used Winn-Davis's actual earnings for all years through 1986. Where the earnings figure differs from the figure you used in your computations, we have a footnote explaining the error. Our back pay component is calculated through June 30, 1987, anticipating that it may take an additional forty-five days for a "final resolution" of this case.

In calculating the front pay component, we used 1986 actual earnings for Winn-Davis and the TWA employees, Carey and Teets. We included a front pay claim for three years from June 30, 1987.

The following is our calculation of the wage loss components:

BACK PAY

	Winn-Davis's Earnings	Sr. Sales Rep. and/or Acct. Mgrs.		Back Pay	Back Pay W/Int. 6% Per Yr.
1976	13,486(1a)			0	
1977	14,801	Carey/ Teets	16,169	1,368	$ 2,380
1978	16,367	Teets/ Thomas	18,102	3,103	5,092
1979	18,565	Teets/ Thomas	21,159	2,594	4,016
1980	23,100	Teets/ Thomas	24,664	4,158	6,073
1981	7,779	Teets/ Thomas	28,012	20,233	27,877
1982	17,057	Teets	30,749	13,692	17,797
1983	20,885	Teets	32,079	11,194	13,726
1984	14,928(1b)	Teets	31,632	16,704	19,323
1985	19,997(1c)	Carey/ Teets	40,873	20,876	22,783
1986	25,774(2)	Carey/ Teets	36,406(3)	10,632	10,946
1987 (6 Mo.)	12,887(4)		18,203	5,316	5,316
Total Back Pay:					$ 135,329

FRONT PAY

7/1/87-6/30/88 (5)	25,774	Carey/ Teets	36,406	10,632	
7/1/88-6/1/89	25,774		36,406	10,632	
7/1/89-6/1/90	25,774		36,406	10,632	
Total Front Pay:					31,896
Total Wage Loss Components:					$ 167,225

Footnote (1): TWA Schedule "A" Winn-Davis Earnings adjusted as follows:

(1a): Reduced by $615 - Income Earned by Ulysses Winn.

(1b): Reduced by $3,546 - Unemployment Benefits.

(1c): Reduced by $630 - Unemployment Benefits.

Footnote (2): Excludes $1,084 Moving Expense Reimbursement included on W-2

Footnote (3): Assumes a % Reduction in earnings for Carey & Teets equal to %reduction in Teets' earnings from previous years. Carey earnings included because he resumed employment as Account Manager.

Footnote (4): Estimated at 50% of 1986.

Footnote (5): Wage Differentials are based on 1986 Data.

The other item or damages which must be considered is the loss in pension benefits which Winn-Davis has suffered by virtue of your client's discriminatory practices. To compute the pension benefits and the loss of benefits, we utilized the following general information:

1. Date of Birth: January 27, 1943.

2. Date of Normal Retirement: January 27, 2008.

3. Life Expectancy: 81.6 years.

4. Retirement Life Expectancy: 16.6 years.

To compute the pension benefits due Winn-Davis under the TWA pension plan, we utilized the wage and other information which you provided and the following facts:

TWA

1. Retirement Plan for Noncontract Personnel of Trans World Airlines, Inc. (As Amended Effective Jan. 1, 1979) is the current applicable pension plan;

2. No 2% payments were made pursuant to Article 8 thereof;

3. Earnings are assumed to be those annual rates utilized for the computation of front and back pay;

4. As no information is available with respect to the annual amount credited to Winn-Davis as of June 30, 1978 for purposes of computation of the annual 1978 Past Service Retirement Income, the figure derived pursuant to Article 4.3(B) is assumed to be greater than that assigned to Winn-Davis pursuant to Article 4.3(A);

5. In computing the Annual Future Service Retirement Income, wages exceed the Social Security taxable wage base only in 1978 and 1985;

6. The Social Security taxable wage base is $17,700 and $39,600 for 1978 and 1985 respectively;

7. Date of Hire: March 1, 1967;

8. Last Day Worked: June 30, 1990; and

9. Furlough: December, 1969 through April, 1972.

To compute the pension benefits due Winn-Davis under the Bristol-Myers Pension Plan, we utilized the actual earnings of

Winn-Davis from her hired date through December 31, 1986 and the following facts:

BRISTOL-MYERS

1. Date of Hire: March 25, 1985;

2. Last Day Worked: June 30, 1990;

3. Earnings are assumed to be $25,774 annually, except for 1985 with Winn received $15,910 from Bristol-Myers;

4. Primary Social Security benefits are assumed to be those which would be payable under the current law based on current earnings.

5. Final average pay is assumed to be $25,774;

6. Number of years of service is assumed to be 6; and

7. Bristol-Myers Company Retirement Income Plan (revised 7/84) is the current applicable pension plan.

Based on the above, we compute the pension benefits which are due Winn-Davis under the TWA plan as follows:

TWA PENSION ANALYSIS

A. ANNUAL FUTURE SERVICE RETIREMENT INCOME

Aggregate of applicable TWA wages from 7/1/78 through 6/30/90	$380,572	
Contractual rate	X .015	
		5,709

B. ANNUAL PAST SERVICE RETIREMENT INCOME

1% of first $10,000 of 1977 annual income	100	
1.75% of remainder of 1977 annual income	108	
	208	
Multiplied by years of credited service prior to 7/1/78	9.08333	
		1,889
C. ANNUAL PENSION BENEFIT		7,598

We compute the pension benefits to Winn-Davis under the Bristol-Myers Pension Plan as follows:

ANNUAL PENSION BENEFIT

Final average pay	$ 25,774	
Multiplied by the product of 1.75% and 6 yrs. service	x .105	
	$ 2,706	2,706

Less Credit for Primary S.S. Benefits (1/70 of Primary S.S. Benefit for each year of service. Primary S.S. Benefit based on annual credited earnings of $25,774 = $758.90 month.

Annual S.S. Benefits = 12 x 758.90 =	9,106.80	
Multiple based on years of service 6/70	x 8.5714	
Deduction from Annual Pension	58.780	781
Net annual Pension Based on Bristol-Myers Earning through 6/30/90		1,925

Based on the above, we compute the loss of pension benefits as follows:

LOSS OF PENSION BENEFITS

TWA annual pension benefit	$ 7,598	
Bristol-Myers annual pension benefit	1,925	
Annual Loss of Pension Benefit	$ 5,673	
Multiplied by Retirement Life Expectancy	x 16.6	
TOTAL LOSS OF PENSION BENEFITS		$ 94,171

The following is a statement of the losses sustained by Winn-Davis:

Back pay loss through 6/30/87	$135,329
Front pay loss from 7/1/87 through 6/30/90	31,896
Pension Benefit Loss	94,171
Total Losses	$261,396

I hope you will have authority on Friday to deal realistically with the settlement of this matter.

Very truly yours,

/s/ Richard F. Kronz
RICHARD F. KRONZ

MEMO
****

TO : WGF

FROM: RFK

DATE: May 18, 1987

RE : Emily Winn-Davis
Conference at the Office of Human Relations Commission 5/15/87

The following people attended this conference: Byrd Brown, John Gabriel, Jim Mollica, Michael Katz and Richard F. Kronz.

Mr. Mollica took this opportunity to reiterate his analysis of the case and TWA's liability. In a nutshell, Mollica claims that back pay exposure runs, at best, through 1980 when TWA had significant staff reductions system wide. Mollica claims that that is a significant concession from what they believe to be the provable back pay entitlement of about $700.

Mollica continues to assert that there is a functional difference between Sr. Sales Rep. and Account Manager and that when Winn-Davis would not have been qualified and/or promoted to the position of account manager. Mollica also continues to assert that Winn-Davis would have been displaced from her position as Sr. Sales Rep. or Account Manager when TWA underwent the substantial staff reduction in 1980. He suggested that we would not be able to show that Winn-Davis would have survived in Pgh. beyond that staff reduction. Byrd Brown added that we would have to show that she was a superstar of some sort and that she would have prevailed over everybody else in the system, etc. (Byrd Brown suggested that we would have serious difficulty showing any back or front pay entitlement beyond the date of the TWA staff reductions. When I suggested that we weren't required to show that Winn-Davis would have survived in the Pgh. market because we can show by her testimony that she

would have accepted placement in another area as a Sr. Sales Rep. or Account Manager. Byrd Brown said, "But you're going to have a problem dealing with the fact that men and women, both black and white, were being laid off throughout the system". He suggested that it was going to be our burden to show that she would have had sufficient seniority or someone outstanding characteristics that would have compelled them to retain her over other people in the system. Byrd Brown asked Mollica what he had. Mollica said he thought our demand was too high. Byrd Brown said, "I know their demand is too high - what do you have?". Mollica said he had $40,000. Brown asked what we would accept. I told him that we would accept $200,000. He said "What's your claim really?". I said our claim really is $261,000 because we feel that we can support damages as outlined in our most recent letter.

Byrd Brown alluded to Judge Weber's recent decision denying back pay and front pay in a case where age and race or sex discrimination had been shown. There was no question from the way Brown treated this matter that he didn't think that his Commission would ever come down with an award close to $200,000. The matter has been scheduled for hearing on 7/19/87 at 10:00 a.m. That date will only change if there is no one available to hear the case. Mollica will schedule Emily Winn-Davis's deposition for the purpose of dealing with her failure to mitigate damages. Byrd Brown wants to meet with both counsel two weeks before the scheduled hearing date to identify and list exhibits so that the hearing moves quickly.

After the conference, I listened to Mollica for awhile in the hall. (I really didn't say much because it was obviously important to Mollica to say alot for Mr. Katz's benefit.) Mollica again reiterated his argument about the system-wide reductions, Winn-Davis' refusal to move from Pgh. when offered management positions in Cincinnati and New York, etc. He several times suggested that we should make sure that Winn-Davis is realistically looking at her damage entitlement in this case so that she doesn't get some distorted idea of its value.

August 11, 1987

James A. Mollica, Jr., Esq.
MEYER, DARRAGH, BUCKLER,
BEBENEK & ECK
2000 Frick Building
Pittsburgh, Pennsylvania 15219

Dear Mr. Mollica:

Re: Winn-Davis v. TWA

Per your request, I submit the details for the allocation of the cash portion of the subject settlement:

1. Cash portion of settlement $95,000.00

2. Portion of cash settlement allocated to payment of counsel fees and costs:

   (a) Attorney Time - 189.5 hrs. at $125 . $23,687.50

   (b) Attorney Time - 180.8 hrs. at $ 85 . . 15,368.00

   (c) Law Clerk - 273.2 hrs. at $ 25 . . 6,830.00

   (d) Reimbursable Expenses 2,147.00

   Total Due Freeland & Kronz 48,032.50

   Net to Winn-Davis $46,967.50

Per your discussion with Wendell Freeland, I understand that one-half of the net payment to Winn-Davis will be identified as "tort recovery" and the remaining one-half will be identified as wages with appropriate withholdings. The identification number

for Freeland & Kronz is 25-1285282. If additional information is required, please give me a call. I trust you will expedite issuance of the appropriate drafts and the travel credit vouchers so that we can conclude this matter.

Very truly yours,

RICHARD F. KRONZ

GENERAL RELEASE OF ALL CLAIMS

KNOW ALL MEN BY THESE PRESENTS:

That EMILY E. WINN, residing at 1762 Skyline Dr., Pittsburgh, Pa 15227, Pennsylvania being of lawful age, intending to be legally bound, and for and in consideration of the sum of NINETY-FIVE THOUSAND AND 00/100 DOLLARS ($95,000.00) to her in hand paid (less applicable withholding taxes), and other good and valuable consideration, the receipt of which is hereby acknowledged, on behalf of herself, and on behalf of her heirs, executors, administrators, successors, subrogees and assigns, does hereby remise, release, acquit and forever discharge TRANS WORLD AIRLINES, INC. ("TWA"), its affiliates, successors, assigns, directors, officers, servants, agents and employees, and their respective heirs, executors and administrators, and all persons, corporations and other entities jointly or severally liable with them ("RELEASEES"), of and from any and all actions, causes of action, suits, claims, rights, demands, damages, debts, obligations, costs, loss of services, expenses and/or compensation whatsoever, in law or in equity, known or unknown, which as against the said RELEASEES or anyone claiming through her ever had, now has, or hereafter can, shall, or may have, for, upon or by reason of any matter, cause or thing whatsoever from the date of the beginning of the world to the day of the date of these Presents, including, but not limited to, any and all claims for damages, compensation, injury to personal reputation or character, personal injuries, mental anguish, wages, back pay, interest, attorneys' fees, costs, reinstatement, or equitable, injunctive or declaratory relief for, on account of, or in any way relating to or arising out of EMILY E. WINN'S employment by TWA or the termination thereof, and including, but not limited to, all claims alleged, or which could or may have been alleged, by her in *Winn v. Trans World Airlines, Inc.*, now pending before the Pittsburgh Commission on Human Relations at No. FEB B-262.

It is understood that the settlement amount recited above consisting of NINETY-FIVE THOUSAND AND 00/100 DOLLARS ($95,000.00) shall be paid, allocated and apportioned in the following manner:

1. The sum of $23,483.75, less applicable withholding taxes, shall be paid to EMILY E. WINN as and for back pay or front pay.

2. The sum of $23,483.75 shall be paid to EMILY E. WINN as and for all alleged tort claims or any other claims not represented asserted wage losses.

3. The sum of $63,032.50 shall be paid to Emily E. Winn and FREELAND & KRONZ, her attorneys, as and for attorneys' fees and expenses in connection with the above-recited case, in the form of $48,032.50 in cash and $15,000 worth of "miscellaneous charge orders" ("MCO") which may be utilized by said attorneys or their designees for purchase of air transportation of TWA's system of a total value of $15,000, within one year of the date of issuance to said attorneys by TWA of said MCO's, provided that no such MCO shall be issued hereunder later than August 1, 1991.

EMILY E. WINN shall forthwith dismiss and discontinue or cause to be dismissed and discontinued the above-referenced action, and all other pending proceedings against TWA, if any, whether or not related thereto, all with prejustice and without costs.

It is agreed that the settlement made herein is made in compromise of doubtful and disputed claims, and that nothing herein contained nor the payment to be made as provided for herein is to be construed as an admission by TWA as to any liability whatever to any party in consequence of any of the acts of TWA alleged in the claims or charges recited herein-above, such liability having been expressly denied, and continuing to be expressly denied.

It is further agreed that the execution of this Release is with the full knowledge that it is intended to cover all possible claims, and that the total monetary consideration stated hereinabove is all that EMILY E. WINN and her attorneys and representatives, if any, are ever to receive from TWA for all claims to damages, costs, attorneys' fees and other expenses in the premises, that EMILY E. WINN and her attorneys hereby release, remise, and forever discharge TWA and its respective affiliates, successors, assigns, directors, officers, servants, agents and employees and their heirs, executors and administrators, and all persons, corporations and other entities jointly or severally liable with them, of and from any and all claims which she or her attorneys or anyone claiming through her or her attorneys ever had, now has, or may hereafter have to costs or attorneys' or other fees arising out of their representation of EMILY E. WINN in the above-referenced action, including any attorneys' liens. EMILY E. WINN further agrees that she is not to be considered to have been or to be the "prevailing party" with respect to the charges or claims made in the above-referenced matters within the meaning of any statute, rule or other provision of law which is or may be in any way applicable hereto.

It is hereby declared and warranted that EMILY E. WINN has not assigned or transferred to any person or party, and that to her knowledge no person or party other than she has any right to recovery for, any claim for damage or loss to her as aforesaid. EMILY E. WINN does hereby covenant and agree to indemnify and save harmless TWA against any loss or expense including, but not limited to, costs and attorneys' fees, incurred by reason of any claim, suit, judgment or recovery of any nature whatever by any assignee or transferee known by her to exist in breach of the foregoing declaration and warranty or by any member of her immediate family as to any such damage or loss.

As a further and express consideration for payment of the above-referenced sum, EMILY E. WINN agrees that she waives and releases any claims for her reinstatement as an employee of TWA and that she will not at any time in the future apply for or

seek employment in any capacity with TWA at any of its facilities wheresoever located, and that if she were so to apply for such employment, TWA may reject her application with impunity and without recourse or liability to her of any nature or kind whatsoever.

As a further and express consideration for payment of the above-referenced sum, EMILY E. WINN does hereby declare and promise that the terms and provisions of this settlement shall be kept in utter, absolute and strictest confidence and secrecy, and neither the sum involved in this settlement nor any other such terms and provisions shall be revealed by her, or by her attorneys, to any person or party, other than her accountant, tax consultant, taxing authorities, governmental agencies having jurisdiction or immediate members of her family (including brothers and sisters) without the written permission of TWA. Without such permission, EMILY E. WINN shall be entitled only to reveal that the matter has been concluded without any reference to the manner of conclusion. EMILY E. WINN agrees to inform anyone to whom she so reveals any such terms and conditions that they are considered confidential and to request any such person to make no disclosure thereof to any other person. EMILY E. WINN further agrees that she will not counsel or in any manner assist any other present or former TWA employee in connection with any pending or contemplated administrative or legal proceedings against TWA except as may be required by law. In the event this covenant of confidentiality is breached, it is agreed that the exact amount of damage done to TWA by such breach would be impossible to determine and that the sum of FIFTEEN THOUSAND AND 00/100 DOLLARS ($15,000.00) would be a fair amount of liquidated damage. And further, EMILY E. WINN does hereby agree to pay to TWA the sum of FIFTEEN THOUSAND AND 00/100 DOLLARS ($15,000.00) in the event this covenant of confidentiality is breached and in addition agrees to indemnify and save TWA harmless from all damages, costs and attorneys' fees caused or necessitated by any such breach of this covenant of confidentiality.

EMILY E. WINN acknowledges that this Release constitutes a waiver, satisfaction, discharge and covenant not to sue with respect to future claims as well as all present claims, damages or demands of any kind, known or unknown, by EMILY E. WINN against TWA, including benefits, compensatory damages, liquidated damages, punitive damages, and attorneys' fees, which are based upon or in any way related to the facts and circumstances involved, whether pleaded or not pleaded, in the above-referenced action.

EMILY E. WINN and FREELAND & KRONZ, intending to be legally bound, further acknowledge and understand that taxing agencies may claim that tax payments and similar obligations are owing on account of the settlement memorialized by this Release. EMILY E. WINN and FREELAND & KRONZ covenant and agree that in event any claim for tax payments or similar obligations is made by any taxing agency, then (a) TWA has or shall have no obligation to pay EMILY E. WINN any sum of money in addition to the payment made hereunder; (b) EMILY E. WINN's liability (if any) for taxes and similar obligations in respect of this settlement beyond the amounts to be paid by TWA to taxing agencies on EMILY E. WINN's behalf is for her sole account and of no concern to TWA; (c) EMILY E. WINN will pay such taxes and similar obligations (if any) as may be due beyond the amounts to be paid by TWA on her behalf; and (d) EMILY E. WINN and FREELAND & KRONZ will indemnify and hold TWA harmless from any tax or similar liability beyond the amounts to be paid by TWA on her behalf. It is understood and agreed that in the event the taxes and similar obligations payable on account of this settlement prove to be less than the amount paid by TWA to taxing agencies hereunder, any amount refundable by any taxing agency shall be refundable to EMILY E. WINN and may be retained by her for her sole benefit, TWA having no right to or interest in any such refunded amount.

EMILY E. WINN agrees that she will not file or permit to be filed on her behalf, either individually or as a member of any

class, any claim, grievance, charge, complaint or other process of any nature or kind whatsoever against TWA with any federal, state or municipal court, board, panel, agency, department, organization or other entity concerning any fact, matter, circumstance, statement, event, incident, occurrence, cause or thing whatsoever from the date of the beginning of the world to the date of this Release whether or not based upon or in any way related to the facts and circumstance involved, whether pleaded or not pleaded, in the above-referenced action and EMILY E. WINN acknowledges that this Release extends to, and extinguishes, every such right and claim which might be recognizable before any federal and/or state and/or municipal agency or court.

In the event that any class action suit is commenced which asserts claims against TWA that were the subject of or could have been the subject of the above-mentioned action, and in which EMILY E. WINN is named as a class member, EMILY E. WINN will in no way voluntarily participate in or accept any recovery, remuneration or benefits therefrom. If allowed by law, EMILY E. WINN will opt out of any class action suit upon notification of her inclusion as a potential class member.

EMILY E. WINN does hereby covenant and agree to indemnify and hold harmless TWA, and its respective affiliates, successors, assigns, directors, servants, agents and employees, and their respective heirs, executors and administrators, from and against all claims, damages, debts, obligations, costs, losses and expenses (including, but not limited to, attorneys' fees and litigation expenses) in the event it becomes necessary for TWA to defend any claim or claims released by this Release.

EMILY E. WINN and FREELAND & KRONZ agree to return to TWA all originals and copies of all documents produced to her by TWA or obtained by her from any other sources in connection with or related to the above-referenced action.

It is agreed that this Release shall not be subject to any claim of mistake of fact; that it expresses a full and complete settlement; and that regardless of the adequacy or inadequacy of the amount paid as aforesaid, this Release is intended to avoid further litigation and to be final and complete. In executing this Release, EMILY E. WINN does so with informed knowledge of such rights as she may have as against TWA, and acknowledge that said rights and the consequences of this Release have been fully and completely explained to her by her attorney. In executing this Release, EMILY E. WINN does not rely and has not relied upon any statements or representations made by TWA or any of its officers, directors, agents, servants, employees, attorneys or representatives in regard to this Release or the basis therefor.

This Release contains the entire agreement between EMILY E. WINN and TWA, and terms of this Release are contractual and not merely a recital; there are absolutely no agreements or reservations not clearly expressed herein; and EMILY E. WINN has carefully read this Release, fully understands it, and signs this as her free and voluntarily act and deed.

This Release may not be changed orally.

IN WITNESS WHEREOF, EMILY E. WINN has hereunto affixed her hand and seal on this 11th day of September, 1987.

/s/ Emily E. Winn
EMILY E. WINN

/s/ Freeland & Kronz
Freeland and Kronz
/s/ By Wendell G. Freeland

ACKNOWLEDGEMENT

COMMONWEALTH)
OF PENNSYLVANIA)
) SS:
COUNTY)
OF ALLEGHENY)

On this 11th day of September, 1987 before me personally came EMILY E. WINN, to me known, who, being by me first duly sworn, did depose and say that she executed the foregoing General Release of All Claims for the purposes therein contained.

IN WITNESS WHEREBY, I have hereunto set my hand and seal.

Commission Expires:

CAROL A. KRONZ, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES APRIL 9, 1988
Member Pennsylvania Association of Notaries

/s/ Carol A. Kronz
Notary Public

ACKNOWLEDGEMENT

COMMONWEALTH)
OF PENNSYLVANIA)
) SS:
COUNTY)
OF ALLEGHENY)

On this 11th day of September, 1987 before me personally came WENDELL FREELAND of me known, who, being by me first duly sworn, did depose and say that he executed the foregoing General Release of All Claims for the purposes therein contained.

IN WITNESS WHEREBY, I have hereunto set my hand and seal.

Commission Expires:

CAROL A. KRONZ, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES APRIL 9, 1988
Member Pennsylvania Association of Notaries

/s/ Carol A. Kronz
Notary Public

Freeland & Kronz
Attorneys at Law
1111 Manor Building
564 Forbes Avenue
Pittsburgh, Pennsylvania 15219
(412) 471-5287

Emily Winn-Davis
7442 Schoyer Dr.
Pittsburgh, PA 15218

December 31, 1987
Page 4
Client: 1036
Matter: 1

Matter: Davis vs. TWA
(Cont.)

Date	Professional Services Rendered	Atty	Hours	Amount
10/07/87	Photocopies of case for research	MMH	0.20	17.18

Total Hours: 518.00 Total Services: 68,989.73

Attorney Recap	Hours	Rate	Amount
WGF Wendell G. Freeland	416.20	100.00	54,988.84
WGF Wendell G. Freeland	29.50	125.00	4,871.97
CAM Craig A. McClean	34.30	85.00	3,852.00
MMH Margaret M. Hock	4.50	35.00	208.09
CAM Craig A. McClean	1.50	100.00	198.18
RFK Richard F. Kronz	27.00	125.00	4,459.10
MMH Margaret M. Hock	4.55	65.00	390.74
M-H Miscellaneous Help	0.25	35.00	11.56
LAL Linda Ann Lis	0.20	35.00	9.25

Disbursements

10/05/87	Prothonotary costs	5.00	
	Settle and discontinue.		
	Unbilled costs	672.76	
	Miscellaneous cost advances	2,500.00	
	Photocopying	11.75	
	Total Disbursements		3,189.51

Totals for this matter:

Prior balance:	0.00
Payments	0.00
Current Charges	72,179.24
Transferred from retainer	72,179.24-
Balance due	0.00

case. And I did not make a report to the Court as I did in the other cases that I attended to that day that that was a no asset case.

Q. In reviewing the schedules of assets and liabilities at the creditors meeting, do you recall how much Ms. Davis owed creditors?

A. It was an amount far in excess of the potential settlement figure that they were talking about, but I have that right here today and I probably reviewed that at that time but I don't have independent knowledge. But if you want me to look at the schedules now.

Q. Well, I believe they are a little over $11,000 listed in the schedules?

A. That's correct.

Q. I mean, was there any discussion at the creditors meeting why are you going forward with this bankruptcy when you have a potential recovery of $90,000?

A. The answer that I recall receiving from either Mr. Berman or Ms. Davis was the uncertainty as to the possible recovery and the amount. So with that information I have had past experience in [18] examining debtors where many of them at that time, at trustee hearings, indicate they have potential lawsuits. And that many of them do not turn out to be advantageous and that many of them might wind up settling far within the exemption limitation.

So without knowing what the ultimate recovery would be, there was no further discussion about it since Mr. Berman was not handling that lawsuit against TWA.

Q. It was, in essence, a continual claim at that point in time, and your experience was that often what is claimed is not recovered. Would that be a fair characterization?

A. Correct.

MR. SHORT: Would that be continual or unliquidated?

MR. SIMON: It would be continual and unliquidated.

Q. I may have asked you this in a little different form, but the uncertainty -- when I believe you said they, Ms. Davis and Mr. Berman, referred to the uncertainties, they didn't really go into much detail on what those uncertainties were at

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	EMILY DAVIS, a/k/a EMILY WINN,	Bankruptcy No. 84-2291
	Debtor.	
ROBERT J. TAYLOR, Trustee,		
	Plaintiff,	
	vs.	Adversary No. 88-446
FREELAND & KRONZ, a partnership, WENDELL G. FREELAND, RICHARD F. KRONZ, and EMILY DAVIS		Chapter 7 Judge Markovitz
	Defendants.	

COMBINED PRETRIAL STATEMENT OF THE PARTIES

I. Stipulation of the Parties

The parties to the captioned adversary proceeding stipulate to the following facts:

1. As of October 24, 1984, Emily Davis ("Miss Davis" or the "Debtor") was prosecuting an action against TWA for employment discrimination (the "lawsuit") and was represented by the law firm of Freeland & Kronz under a contingency agreement whereby Freeland and Kronz were to receive, as attorneys fees, forty (40) percent of any fund that was created by settlement or verdict related to the lawsuit.

2. Freeland & Kronz is a partnership for the practice of law with offices at 1111 Manor Complex, Pittsburgh, PA 15219, who from March of 1981 through October of 1987, represented the Debtor in the discrimination action against TWA.

3. Richard F. Kronz, Esq. and Wendall G. Freeland, Esq. are a general partners in the law partnership of Freeland & Kronz.

4. On October 24, 1984, Miss Davis filed a voluntary petition under Chapter 7 of the Bankruptcy Code as Case No. 84-2291.

5. Miss Davis listed the lawsuit on her schedule B-2 as an asset of her bankruptcy estate with an unknown value and listed the proceeds of the TWA lawsuit on her schedule B-4 as exempt property pursuant to Section 522 (d) of the Banruptcy Code. The Debtor filed her schedule of "Assets and Liabilities", including her B-2 and B-4 schedules on October 24, 1984, the date of her bankruptcy petition.

6. On November 26, 1984, Robert J. Taylor, Esq. (the "Trustee") was appointed trustee in the bankruptcy proceeding of Emily Davis.

7. On January 4, 1985, the Trustee conducted a Section 341(a) meeting, which was attended by Miss Davis and her bankruptcy counsel, Alan Berman.

8. Neither the trustee, Robert Taylor nor any other party in interest ever objected to the Debtor's claim of exemptions.

9. On January 7, 1985, the Trustee mailed a letter to Richard F. Kronz and Wendell Freeland, informing them of the bankruptcy filing of Miss Davis, the Trustee's appointment, and that the net proceeds of the lawsuit are an asset of the bankruptcy estate.

10. On January 9, 1985, the Trustee received a letter from John A. Meyer, esq., an associate attorney with Freeland &

Kronz, which responded to the trustee's letter of January 7, 1985.

11. On October 16, 1985, Miss Davis received a discharge.

12. On October 20, 1987, Miss Davis signed a settlement statement approving the distribution of the lawsuit proceeds.

13. At the Section 341(a) meeting, Ms. Davis and her counsel, Alan Berman acknowledged the pending action against TWA.

14. On November 26, 1984, Robert J. Taylor, Esquire, (the "Trustee") was appointed Trustee in the Bankruptcy proceeding of Emily Davis.

15. On or about October 20, 1987, Freeland & Kronz distributed $39,356.75 of the settlement proceeds to the law partnership for its legal fees and reimbursement of costs advanced and distributed $32,159.50 to Ms. Davis.

16. On May 2, 1988, the Trustee sent a letter to Freeland & Kronz requesting an update on the status of the lawsuit.

17. On May 6, 1988, Richard Kronz mailed a letter to the Trustee informing him of the settlement.

18. Ms. Davis's Bankruptcy case has never been closed.

[70] Taylor - Recross

Q. Mr. Taylor, I'm Stanley Levine. I represent Emily Davis.

A. I know you, Mr. Levine.

Q. I just have a couple of questions on the net proceeds –

A. All right.

Q. – language we've been discussing.

A. All right.

Q. Do you know – did you know when the first meeting occurred what the arrangement or agreement regarding fees was as between the Debtor, Ms. Davis, and the law firm of Freeland and Kronz?

A. No, I did not.

Q. So, you weren't sure at that time whether it was contingency fee agreement or an hourly rate agreement?

A. Yeah. I knew none of that information.

Q. Was there ever any attempt made by you or through you to have the firm engaged as counsel to the Debtor with respect to the further prosecution of the lawsuit after the filing of the bankruptcy?

A. I didn't make any independent effort in that regard because I didn't know whether there was going to be any type of a settlement.

MR. LEVINE: I have no further questions.

THE COURT: Let me clear it up so that I can understand it, too.

[71] Taylor - Examination by Court

THE WITNESS: Surely.

EXAMINATION BY THE COURT:

Q. Your understanding of net proceeds. The gross sum would be paid in settlement, deducted therefrom would be attorney's fees and costs, and the balance would be administered in this estate. Is that what you had – is that what you meant by

A. Well, that was the general gist of my letter, yes.

Q. Now, with reference to the 341 meeting, you made notations. And the thought crossed your mind to object to exemptions, but you decided not to because you didn't know – I think the word you used, the lawsuit might be a nullity.

A. That's correct.

Q. So that you thought about objecting to exemptions, determined not to because this lawsuit might be a nullity. What do you mean by a nullity?

A. That there would be no recovery.

Q. The thought also crossed your mind that the sum recovered would be small enough so as to fit into the exemptions, did it not?

A. Yes, Your Honor.

Q. And you determined not to object – not to require that those sums come into the estate and thereafter be distributed by the Trustee?

* * * *

Human Relations Commission Office held May 15th, 1987, is it not?

A. Correct.

Q. And the second paragraph indicates a change in TWA's position occurred at or within that meeting, was it not?

A. Yes.

Q. Okay. They appear to have conceded that Ms. Davis might be entitled to damages more than 700 and they specifically said that back pay exposure may run through 1980, is that correct?

A. Yes. I don't know that in saying that he was conceding that there was any further back pay, you know, any increase in the back pay component.

Q. Now, that memo about halfway down in the last paragraph on the first page, I believe there's a parenthesis, and it states, Byrd Brown suggested he would have serious difficulty showing any back or front pay entitlement beyond the date of TWA's staff reduction?

A. Yeah. And that was my great concern. That Byrd Brown was accepting that Emily Win-Davis would not have survived in the TWA organization beyond the date of those staff reductions. And if the Commission accepted that, then we were dead in the water.

Q. And those staff reductions were in 1980, is that correct?

[170]

A. Yes. That's when they started, and they continued for some years after that to the point that I don't even think TWA has a presence in Pittsburgh now.

Q. Okay. And after some further explanation about Byrd Brown's position, you have some quotes in there. Byrd Brown said, quote, I know their demand is too high - what do you have? End quote. Mollica said he had $40,000. Is that your recollection of what happened in that May meeting?

A. That's exactly what I recollected, and I dictated this memo after returning because I thought we had made significant

progress, and I wanted Mr. Freeland to know what that progress was and what my concerns were about where we were going from there.

Q. On the second page of that memorandum there's mention of Byrd Brown alluding to recent decision by Judge Weber (phonetic) as far as front pay and back pay components of the -- of a lawsuit, is there not?

A. Um hum.

Q. In fact, he had denied both back pay and front pay?

A. Yes.

Q. Do you recall what significance Mr. Brown -- why that was brought up at this meeting or what was the intent of him doing that? Do you want to explain anything more about that?

A. Well, the purpose of it was so that I would be aware that the fact that we may go before the Commission and establish

* * * *

get authority to pay over $100,000, in a case like this, or would never give authority to pay.

Q. Okay. And I'll refer your attention to the -- after the numbers on the page the next paragraph that begins, per your discussion with Wendell Freeland, I understand that one-half of the net payment to Win-Davis will be identified as tort -- quote, tort recovery, end quote. We've gone into it before today. Is it fair to say that that characterization of tort recovery was an attempt to deal with the tax --

MR. SHORT: Objection. He's leading the witness on this question. It's his own witness.

THE COURT: Sustained.

MR. SIMON: Okay. Let me rephrase the question.

BY MR. SIMON:

Q. Referring your attention to the same quoted section, why was it necessary to write to Mr. Mollica to say that something shall be identified as the tort recovery?

A. Well, the components of the recovery were important, and how it was characterized was important because of the tax consequences to Emily Win-Davis. That part of the recovery that was to be characterized as wages would be fully taxable to her and because it was a discrimination lawsuit, it is appropriate in those cases for part of any recovery or settlement to be identified as a tort recovery for the tortuous act committed, the discriminatory act committed against her, [174] which is nontaxable as income to Emily Win-Davis.

Q. Had a month prior to this there been any discussion regarding a tort recovery?

A. I would say, yes. In my discussions with Mollica, I always insisted that -- I always considered that part of the recovery had to be tort recovery.

Q. When do you first recall it being raised in the negotiations, the idea of characterizing a portion of it as, quote, tort recovery?

A. I'm sure it would have been after the conference that I attended in May when for the first time some real dollars were considered.

Q. Now, I'll turn your attention to Defendant Exhibit K which is your letter to Mr. Taylor dated May 6, 1988. I believe it's been discussed.

A. Yes.

Q. Now, I really want you to refer to the second page, the enclosure, with that letter.

A. Yes.

Q. And that is essentially a statement of the distribution of the proceeds pretty much for the client's benefit, would that be fair?

A. Yes.

Q. And running down that a moment, in the second group of numbers starting with costs advanced, 356, the third entry

* * * *

[10] trustee's failure to object to an exemption removes the asset from the estate when the debtor did not properly disclose all information required to describe the property interest intended to be exempted. A debtor should be encouraged to complete his schedules accurately.

Section 522(d)(11)(E) provides as follows:

> (11) The debtor's right to receive, or property that is traceable to –
>
> > (E) The payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor.

When Miss Davis commenced her bankruptcy proceeding, she did not have a right to receive nor had property that is traceable to "a payment in compensation of loss of future earnings. . ." All she had was a cause of action for back wages through October 24, 1984. Any lost wages that occurred after October 24 would not be property of the Debtor's estate. As of the commencement of the Debtor's case, the lawsuit was a claim for back wages, not loss of future earnings. Therefore, sub-section 11(E) is not relevant to this dispute. The Trustee believes that the cause of action for back wages through October 24, 1984 is property of the Debtor's estate. The Trustee concedes that, to the extent that the cause of action is for future wages which would have been paid to Miss Davis after October 24, 1984, it is not property of the estate, because the cause of action for those wages accrued post-petition.

Miss Davis failed to exercise her duty to complete properly Schedule

* * * *

[17] 1987 through June 1, 1990 in the amount of $31,896. The Trustee believes that it is reasonable to infer from the testimony of Attorneys Freeland, Kronz, and Meyer, that the settlement includes approximately one and one-half years of front pay, in the amount of $15,948. The Trustee also believes that is clear from the testimony of Attorneys Freeland, Kronz, and Meyer that no recovery was obtained for pension losses. Therefore, a fair characterization of the basis for the settlement payment in light of the evidence is that the $110,000 was paid in settlement of a claim of $151,277, which is comprised of back pay claim of $135,329 and a front pay claim of $15,948. Because the claim was not paid in full, it is necessary to prorate the total claim of $151,277 between front pay and back pay in relation to the $110,000 settlement. $135,329 represents 89.46% of a claim of $151,277. The front pay claim of $15,948 represents 10.54% of the total claim of $151,277. If these percentages are applied to the $110,000 settlement, $98,406 represents the settlement portion to be allocated to back pay and $11,594 represents the amount to be allocated to front pay.

However, back pay through July 1, 1987 is not the same as back pay due on October 24, 1984, when the Debtor commenced her bankruptcy proceeding. The Trustee agrees that the portion of the back pay component which is for wage losses occurring after the commencement of the Debtor's case is not property of the estate. Therefore, it is appropriate to allocate the $98,406 back pay portion of the settlement between the pre-bankruptcy back pay claim of $92,612 and the post-bankruptcy back pay claim of $42,716. The pre-bankruptcy portion of $92,612 represents

* * * *

IN THE SUPREME COURT
OF THE UNITED STATES

[Title Omitted in Printing]

Order Granting Petition for Writ of Certiorari entered 27 November 1991.

(5)

No. 91 - 571

Supreme Court, U.S.
FILED
JAN 13 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT J. TAYLOR, Trustee,

Petitioner,

v.

FREELAND & KRONZ, a Partnership; WENDELL G. FREELAND; and RICHARD F. KRONZ,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Curcuit

---

BRIEF FOR PETTITIONER

GARY W. SHORT
Suite 2317, Koppers Building
Grant Street & Seventh Avenue
Pittsburgh, PA 15219
(412) 765-0100

TIMOTHY B. DYK
(Counsel of Record)
STEPHEN J. GOODMAN
PATRICK J. POTTER
DARRYL R. MARSCH
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939
PETER M. LIEB
JONES, DAY, REAVIS
& POGUE
599 Lexington Avenue
New York, New York 10022
(212) 326-3939

Counsel for Petitioner

QUESTION PRESENTED

Whether, under Section 522(*l*) of the Bankruptcy Code, a bankruptcy court must exempt property from the bankruptcy estate, even though the debtor had no colorable basis for claiming the exemption, because no one objected to the claimed exemption within the period set forth in Bankruptcy Rule 4003(b).

PARTIES TO THE PROCEEDING

The parties to the proceedings in the court below were: Robert J. Taylor, as Trustee in the bankruptcy proceeding of Emily Davis; Freeland & Kronz, a partnership; Wendell G. Freeland; and Richard F. Kronz.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-571

ROBERT J. TAYLOR, Trustee,

Petitioner,

v.

FREELAND & KRONZ, a Partnership;
WENDELL G. FREELAND; and
RICHARD F. KRONZ,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Appendix to the

Petition for Certiorari ["Pet. App."], at 1a) is reported at 938 F.2d 420. The memorandum opinion of the United States District Court for the Western District of Pennsylvania (Pet. App. 18a) is reported at 118 Bankr. 272; its order affirming the judgment of the bankruptcy court is unreported (Pet. App. 16a). The memorandum opinion of the United States Bankruptcy Court for the Western District of Pennsylvania (Pet. App. 30a) is reported at 105 Bankr. 288; its judgment (Pet. App. 28a) is reported at 105 Bankr. 294.

JURISDICTION

The court of appeals entered its judgment on July 8, 1991. The Petition for a Writ of Certiorari was timely filed on October 7, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)(1988).

STATUTES AND RULES INVOLVED

Section 105 of the Bankruptcy Code, 11 U.S.C. § 105 (1988), provides in pertinent part:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Section 522 of the Bankruptcy Code, 11 U.S.C. § 522 (1988), provides in pertinent part:

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is --

> (1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,
>
> (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer

portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

* * *

(d) The following property may be exempted under subsection (b)(1) of this section:

(1) The debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $1,200 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $200 in value in any particular item or $4,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $500 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value $400 plus up to $3,750 of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $4,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive --

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veteran's benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless --

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

(11) The debtor's right to receive, or property that is traceable to --

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed $7,500, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

* * *

(*l*) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may

claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

Section 1621 of Title 18 of the United States Code, 18 U.S.C. § 1621 (1988), provides in pertinent part:

Whoever -

* * *

(2) In any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. . . .

Rule 1007, Federal Rules of Bankruptcy Procedure, provides in pertinent part:

(c) Time Limits. The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter, except as otherwise provided in subdivisions(d), (e), and (h) of this rule. . . . Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United

States trustee and to any committee elected pursuant to §705 or appointed pursuant to § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

Rule 1008, Federal Rules of Bankruptcy Procedure, provides:

All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.

Rule 1009, Federal Rules of Bankruptcy Procedure, provides in pertinent part:

(a) General Right to Amend. A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

Rule 4003, Federal Rules of Bankruptcy Procedure, provides in pertinent part:

(a) Claim of Exemptions. A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. If the debtor fails to claim exemptions or file

the schedule within the time specified in Rule 1007, a dependent of the debtor may file the list within 30 days thereafter.

(b) Objections to Claim of Exemptions. The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person.[1]

(c) Burden of Proof. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections. . . .

Rule 9011, Federal Rules of Bankruptcy Procedure, provides in pertinent part:

(a) Signature. Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office

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[1]The phrase "or supplemental schedules" was added to subsection (b) by the amendments to the Bankruptcy Rules, effective August 1, 1991.

address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

STATEMENT OF FACTS

This case presents the question of whether, under Section 522(*l*) of the Bankruptcy Code, 11 U.S.C. § 522(*l*), a debtor may obtain an exemption for certain property, even though there was no colorable legal basis for claiming such an exemption, because no one filed a formal objection to the claimed exemption within the 30-day period set forth in Bankruptcy Rule 4003(b).

The exemption at issue in this case was claimed by Emily Davis ("Davis") concerning the proceeds of a lawsuit for employment discrimination that she had filed against Trans World Airlines ("TWA"). In April of 1978, Davis filed a Complaint with the Pittsburgh Commission on Human Relations ("Commission"), alleging that TWA had discriminated against her by denying her promotions on the basis of her race and sex.[2]

On December 16, 1980, the Commission entered an Order directing TWA to pay Davis "lost wages representing the difference between her salary as a Reservations Sales Representative and the salary of a Senior Sales Representative, the position she was denied because of unlawful discrimination from the period March, 1976 until the date TWA no longer employed Senior Sales Representatives in its Pittsburgh office." Joint Appendix (hereinafter "Jt. App."), at 3. The Commission characterized its award as a "back pay" award. Appendix filed with the Third Circuit (hereinafter "App."), at 102. The actual amount of the award was to be determined after TWA had provided the Commission with the necessary information about Davis' wages and the wages of Senior Sales Representatives in the Pittsburgh area. Jt. App. 4.

TWA appealed the Commission's decision to the Court of Common Pleas of Allegheny County. On September 23, 1981, the Court of Common Pleas reversed the Commission's decision and held that

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[2]Brief for Appellants, at 6-7, *Taylor v. Freeland & Kronz*, No. 90-3693 (3d Cir. July 8, 1991) (hereinafter "Brief").

TWA was not liable to Davis. App. 111. Davis in turn appealed to the Commonwealth Court of Pennsylvania, which, on June 27, 1983, reversed the judgment of the Court of Common Pleas and reinstated the Commission's award. App. 125. TWA then filed a petition for Allowance of Appeal with the Supreme Court of Pennsylvania, which on November 18, 1983, agreed to hear the appeal. App. 294.

On October 24, 1984, after the appeal had been briefed and argued in the Supreme Court of Pennsylvania, but before that court had issued its decision, Davis filed a voluntary petition under Chapter 7 of the Bankruptcy Code. Jt. App. 55. On the schedules which she filed with her bankruptcy petition, Davis claimed an exemption, under 11 U.S.C. § 522(d), for:

> Proceeds from lawsuit - Winn v. TWA
> Claim for lost wages

Jt. App. 18.[3] Section 522(d) does not exempt claims for past wages as such from the bankruptcy estate. *See* pp. 31-33, *infra*.

On the portion of the form in which she was to state the "value" of those proceeds, she indicated that the value was "unknown." Jt. App. 18. However, it appears that she and her attorneys expected to recover

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[3]Section 522(b), which Davis also cited as a basis for the claimed exemption, simply provides that a debtor may select either the federal exemptions listed in Section 522(d) or, alternatively, exemptions which are available under state or other law. 11 U.S.C. § 522(b).

approximately $100,000 if the Commission's decision was upheld by the Pennsylvania Supreme Court.[4] It also appears that she and her attorneys expected that as much as $70,000 of the expected recovery would constitute compensation for lost pre-petition earnings.[5]

Section 522(b) of the Bankruptcy Code, 11 U.S.C. § 522(b), provides that "an individual debtor may exempt from property of the estate" either the types of property listed in 11 U.S.C. § 522(d) or, in the alternative, property which is exempt under other legal provisions (including state and local law). The procedure for claiming these exemptions is set forth in 11 U.S.C. § 522(*l*), which requires the debtor (or a dependent of the debtor) to "file a list of property that the debtor claims as exempt under" 11 U.S.C. § 522(b).[6] Under Bankruptcy Rule 4003(b), "[t]he trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the

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[4]As is more fully discussed below, p. 15, either Davis or the attorney representing her in the bankruptcy proceeding estimated, on January 4, 1985, that the lawsuit was worth $90,000. Jt. App. 26. And one of the attorneys representing her in the TWA lawsuit estimated, on January 9, 1985, that the lawsuit was worth $110,000. Jt. App. 28.

[5]The attorneys representing Davis in the TWA lawsuit prepared an estimate of her damages, in 1987, which indicated a wage loss of approximately $70,000 (without interest) through 1984. Jt. App. 31.

[6]Specifically, "[a] debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007." Bankruptcy Rule 4003(a).

conclusion of the meeting of creditors held pursuant to [Bankruptcy] Rule 2003(a). . . ." The bankruptcy court then determines whether the claimed exemptions are valid, and if they are, the property at issue is removed from the bankruptcy estate.

On November 26, 1984, Petitioner Robert Taylor ("Taylor") was appointed trustee in the bankruptcy proceeding. App. 41. Three days later, on November 29, 1984, the Supreme Court of Pennsylvania ruled in Davis' favor by affirming the judgment of the Commonwealth Court. App. 128.

On January 4, 1985, Taylor conducted the meeting of the creditors held pursuant to Bankruptcy Rule 2003(a). Jt. App. 25. Neither Taylor nor any of the creditors filed any objections, within the 30-day period specified by Rule 4003(b), to the exemptions claimed by Davis. Although Taylor considered the proceeds from the TWA lawsuit (less "costs and attorney fees") to be the property of the estate, he wanted to find out, before making any formal objections to the claimed exemptions, how much money (if any) Davis would actually recover from that lawsuit. App. 227, 230, 234-235.[7] Nonetheless, in his letter of January 7, 1985 to respondents Wendell G. Freeland ("Freeland") and Richard F. Kronz ("Kronz"), Taylor advised them of his position that "the net proceeds of said suit would be an asset in the bankruptcy estate." He also asked about the status of the litigation. Jt. App. 27. In a letter dated January 9,

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[7]Either Davis or her bankruptcy counsel had advised him that Davis could recover as much as $90,000 from the TWA lawsuit. Jt. App. 55, 26; App. 232-233.

1985, an associate of Freeland & Kronz responded by informing Taylor that the Pennsylvania Supreme Court had ruled in Davis' favor and that Freeland & Kronz had calculated the damages (which had not yet been judicially determined) at $110,000. Jt. App. 28.

The bankruptcy case was never closed, although Davis was discharged on October 16, 1985. Jt. App. 56. On March 25, 1985, the Supreme Court of Pennsylvania agreed to let TWA reargue its appeal of the Commission's award, but on October 1, 1986, the Supreme Court held that reargument of the appeal had been improvidently granted and dismissed TWA's appeal. App. 141.

At this point, Davis and TWA were now ready to proceed with a hearing on damages before the Commission, and such a hearing was tentatively scheduled for July 9, 1987. App. 344. However, that hearing was never held, because the parties settled the case. *Id.*

On September 11, 1987, Davis executed a settlement agreement with TWA under which TWA was to pay her and her attorneys approximately $110,000, including $23,483.75 (less applicable withholding taxes) "as and for back pay or front pay," $23,483.75 "as and for all alleged tort claims or any other claims not represented [sic] asserted wage losses," and $63,032.50 "as and for attorney's fees and expenses . . . ." Jt. App. 42. Neither Davis nor her attorneys informed Taylor of the settlement until May of 1988, after Taylor had written to Freeland & Kronz requesting information on the status of the lawsuit. App. 48, 75.

In October, 1988, Taylor filed a complaint against Davis, Freeland & Kronz, Freeland, and Kronz seeking to recover for the bankruptcy estate $79,016.25 which had been paid as part of the TWA settlement. App. 8-17. The Bankruptcy Court ordered that the defendants return to Taylor the $23,483.75 paid as recovery for tort claims (plus interest), on the grounds that there was "no statutory basis" under 11 U.S.C. § 522(d) for exempting a tort recovery. Pet. App. 40a-41a.[8] It rejected, on the grounds of judicial estoppel, the defendants' assertion that the sum in question actually represented lost future wages, which would be exempt under the Bankruptcy Code,[9] but had been described as being for tort claims in order to avoid paying taxes on it. Pet. App. 41a-42a. It also held that while neither Taylor nor any of the creditors had filed an objection to the claimed exemption within the period specified by Bankruptcy Rule 4003(b) (within 30 days after the meeting of creditors), Section 522(*l*) implicitly requires that "there be a statutory basis for the claimed exemption before the failure of any party in interest to timely object to it has any legal effect". Pet. App. 38a.

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[8]The bankruptcy court concluded that requiring the defendants to return $23,483.75 would "produce a *res* sufficient to pay all of Debtor's [Davis'] creditors" and that it was therefore "not necessary . . . to determine whether" there was any statutory basis under Section 522(d) for exempting the remaining portions of the TWA settlement. Pet. App. 42a.

[9]Section 522 exempts "a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." 11 U.S.C. § 522(d)(11)(E).

The Bankruptcy Court reasoned that Section 522(*l*) incorporates by reference the provisions of Section 522(b), which limits exemptions to those available under federal, state, or local law, and that "[i]f Debtor may select in any manner her exemptions, then no purpose is served by the inclusion of" Section 522(b). *Id.* The Bankruptcy Court also noted that permitting "exemption by declaration" would "encourage certain debtors of questionable integrity to claim *all* of their property as exempt," in the hope that the trustee would fail to object, and that "constant litigation, if not outright chaos, would result." Pet. App. 38a-39a. (emphasis in original) It concluded that "this surely would not be the congressional intent." *Id.*

The District Court affirmed the Bankruptcy Court's decision. It agreed that the doctrine of judicial estoppel was applicable and that "there was no statutory basis for claiming as exempt that part of the lawsuit's proceeds which represented recovery for tort claims." Pet. App. 24a-26a. It also agreed that Section 522(*l*) requires "that there be a statutory basis for a claimed exemption before the failure of any person in interest to timely object to it has any legal effect." Pet. App. 24a. In reaching that conclusion, it reasoned that (1) "[a]llowing the debtor to recover proceeds for which there was no statutory basis would render § 522(b) nugatory" and (2) "the orderly administration of the debtor's estate would not be advanced by allowing her to claim as exempt any value which she had simply designated 'unknown.'" *Id.*

The Third Circuit, however, reversed, and held that the failure of the trustee (or any other party in

interest) to file a formal objection to the claimed exemption within the period specified by Bankruptcy Rule 4003(b) meant that the proceeds of the TWA settlement were exempt under Section 522(*l*). Pet. App. 9a. The Court of Appeals acknowledged that a number of courts, including the Sixth and Eighth Circuits, had ruled that where no one has objected in a timely manner to a claimed exemption, courts are not to fully examine the validity of the exemption, but must still deny the exemption if there was no "good-faith statutory basis" for claiming it. Pet. App. 8a. The Court of Appeals also acknowledged that some courts have gone even further, and held that courts must deny an "invalid" exemption, whether or not anyone objected to it in a timely manner. Pet. App. 7a. But the Court of Appeals rejected both of those approaches and adopted what it characterized as "the 'literal' approach. . . ." *Id.*

In reaching its result, the Third Circuit reasoned that (1) the text of Section 522(*l*) and Bankruptcy Rule 4003(b) "admits of no exceptions to the bright-line procedural rule," (2) that "[n]othing in the legislative materials suggests that any exceptions to this bright-line rule were intended," (3) that "the evolution of the bankruptcy laws suggests that Congress intended to shift the burden of objection from the debtor to the other parties in interest," and (4) that, as a matter of policy, "[t]he time limits and obligations established by section 522(*l*) and Rule 4003(b) serve the dual purposes of finality and certainty." Pet. App. 11a-12a. It also argued that its approach would not, as some courts have feared, "lead to a system of 'exemption by declaration'. . . ," because Bankruptcy Rule 9011 "authorizes sanctions" for

bad-faith exemption claims and "should act as the primary deterrent" against such claims. Pet. App. 13a-14a.

SUMMARY OF ARGUMENT

The court below erred in concluding that Section 522(*l*) of the Bankruptcy Code and Bankruptcy Rule 4003(b) prevent bankruptcy courts from disallowing a claimed exemption when the debtor had no colorable basis for claiming the exemption.

The court below did not discuss or even mention the 1986 amendment to Section 105(a) of the Bankruptcy Code, which requires that Section 522(*l*) be read to permit the denial of exemption claims that constitute an "abuse of process." Section 105(a) provides that "[n]o provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate . . . to prevent an abuse of process." Although Congress has not specifically defined the term "abuse of process" in the Bankruptcy Code, it is clear that the amendment clarifies the power of bankruptcy courts to disallow frivolous claims, even when parties in interest have not raised objections to such claims within the time periods set forth in the Code and the Bankruptcy Rules.

This Court has held that making objectively unreasonable claims constitutes an "abuse of the judicial process," and a number of lower federal courts have confirmed that Section 105(a) requires that Section 522(*l*) be read to permit denial of frivolous

exemption claims even where there has been no timely objection. Finally, insofar as the Bankruptcy Rules permit debtors to amend their claimed exemptions as a matter of course at any time before the case is closed, a rigid interpretation of Section 522(*l*) and Bankruptcy Rule 4003(b) would create significant and unwarranted differences between the treatment of debtors and creditors under the congressional scheme.

Even the court below acknowledged that without some sort of "safeguards," its interpretation of Section 522(*l*) and Rule 4003(b) would encourage debtors to make frivolous exemption claims in the hope that harried trustees might neglect to file timely objections. However, the court erroneously believed that such a safeguard was provided by Bankruptcy Rule 9011 (which is analogous to Fed. R. Civ. P. 11). In fact, Rule 9011 does not apply to exemption claims filed in schedules to the bankruptcy petition. Therefore, were one to ignore Section 105(a) and construe Section 522(*l*) in the manner suggested by the court below, bankruptcy courts would be powerless to discourage frivolous and abusive exemption claims: hardly the result that Congress intended.

In the present case, it is clear that the debtor lacked even a colorable basis for claiming that portion of the exemption which was disallowed by the Bankruptcy Court. She claimed the entire proceeds of a discrimination lawsuit as exempt, even though it was clear that there were no "federal" exemptions, under Section 522(d), for a substantial portion of that award. Consequently, the Bankruptcy Court was justified in disallowing that portion of the claimed exemption, and had the power to do so, under Section 522(*l*) of the

Code, even though no party in interest had filed a formal objection within the thirty-day period specified in Bankruptcy Rule 4003(b).

ARGUMENT

I. IN LIGHT OF SECTION 105(a) OF THE BANKRUPTCY CODE, THE TIME LIMITS OF SECTION 522(*l*) CANNOT BE CONSTRUED TO PROTECT BAD FAITH EXEMPTION CLAIMS

Section 522(*l*) of the Bankruptcy Code, 11 U.S.C. § 522(*l*), requires that "[t]he debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section." It also provides that "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt . . . ." Bankruptcy Rule 4003(b) establishes a thirty-day time limit for objecting to exemptions claimed by the debtor. Construing Section 522(*l*) in conjunction with Bankruptcy Rule 4003(b), the court below concluded that "[u]nless the trustee or another party in interest objects to the debtor's claimed exemptions within the thirty-day period following the creditors' meeting or the amendment, the property claimed as exempt by the debtor is exempt." Pet. App. 6a.

Many lower federal courts, including three Courts of Appeals, have disagreed. Some courts have gone so far as to hold that they may fully examine the merits of any claimed exemption, and deny the exemption if they deem it "invalid," regardless of whether anyone

filed an objection within the thirty-day period.[10] Courts which have construed Section 522(*l*) in this manner have generally concluded (1) that Section 522(*l*) incorporates by reference the provisions of Section 522(b), which strictly limits the exemptions that a debtor may claim; and (2) that to permit "exemption by declaration," whenever the trustee and the creditors neglect to file a timely objection, would encourage debtors to make invalid claims and result in a flood of unnecessary litigation.

A more moderate, "middle-ground" approach, which petitioner believes to be the correct one, has been endorsed by a number of federal courts, including the Courts of Appeals for the Fifth, Sixth, and Eighth Circuits. Under this interpretation of Section 522(*l*), courts are *not* to fully examine the merits of a claimed exemption if no party in interest has objected within the thirty-day period. They are only to determine whether there is a "good faith" (i.e., reasonably disputable) basis for claiming the exemption. If the debtor had a colorable basis for claiming the exemption, then the court must allow it, even if the court believes that the debtor is wrong. On the other hand, if the claim is clearly unreasonable, and there was not even a colorable basis for claiming the exemption, then the court may

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[10] *See, e.g., In re Staniforth*, 116 Bankr. 127, 131 (Bankr. W.D. Wis. 1990); *In re Velis*, 109 Bankr. 64, 65 (Bankr. D. N.J. 1989), *aff'd*, 123 Bankr. 497 (D. N.J. 1991); *In re Ehr*, 116 Bankr. 665, 668 (Bankr. E.D. Wis. 1988); *In re Rollins*, 63 Bankr. 780, 783-784 (Bankr. E.D. Tenn. 1986); *In re Bennett*, 36 Bankr. 893, 895 (Bankr. W.D. Ky. 1984); *Hackett v. Commercial Banking Corp. (In re Hackett)*, 13 Bankr. 755, 757 (Bankr. E.D. Pa. 1981).

disallow the exemption.[11] This approach gives effect to Section 522(*l*) by holding that in the absence of a timely objection, the bankruptcy court must allow all exemptions whose validity is reasonably disputable, even if the court believes those exemptions to be invalid. At the same time, this approach prevents "exemption by declaration" and will discourage debtors from filing frivolous exemption claims in the hope that a harried trustee may neglect to file a timely objection.

This "good faith" approach to Section 522(*l*) is clearly mandated by Section 105(a) of the Bankruptcy Code, which the court below did not mention in its opinion. Section 105(a) provides that:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. *No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate* to enforce or implement court orders or rules, or *to prevent an abuse of process.*

11 U.S.C. § 105(a) (emphasis added). Thus, even though Section 522(*l*) requires a "party in interest" to

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[11] *See, e.g., Halverson v. Peterson* (*In re Peterson*), 920 F.2d 1389, 1393-1394 (8th Cir. 1990); *Munoz v. Dembs* (*In re Dembs*), 757 F.2d 777, 780 (6th Cir. 1985); *Sherk v. Texas Bankers Life & Loan Ins. Co.* (*In re Sherk*), 918 F.2d 1170, 1174 (5th Cir. 1990); *In re Kingsbury*, 124 Bankr. 146, 148 (Bankr. D. Me. 1991); *Clark v. Kazi* (*In re Kazi*), 125 Bankr. 981, 990 (Bankr. S.D. Ill. 1991).

raise the "issue" of whether a claimed exemption is proper, bankruptcy courts may disallow such exemptions in order "to prevent an abuse of process."

The second sentence of Section 105(a), which authorizes bankruptcy courts to prevent an "abuse of process," was added to Section 105(a) by Section 203 of the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. 99-554, 100 Stat. 3088, 3097 (1986). The amendment is clearly applicable to this case, because Section 302(d) of the Act -- which governs, *inter alia*, "[t]he judicial districts established for the State of Pennsylvania" -- provides that the amendments which the Act makes to Section 105 shall become applicable "to cases while pending in such district" no later than 270 days after the effective date of the Act (November 26, 1986). 100 Stat. 3120. Taylor filed his complaint in this case in October, 1988 (App. 4-5), and the Bankruptcy Court issued its order disallowing a portion of the exemption claimed by Davis on September 7, 1989. Pet. App. 28a-29a.

The term "abuse of process" is not defined either in Section 105(a) or elsewhere in the Bankruptcy Code. However, the legislative history of the amendment to Section 105(a), while sparse, suggests that Congress wished to clarify the broad powers of bankruptcy courts to protect the integrity and effectiveness of the bankruptcy process. In June, 1985, the House of Representatives submitted H.R. 2211, 99th Cong., 1st. Sess (1985), to the Senate, which added the second sentence of Section 105(a) pursuant to a floor amendment introduced by Senator Thurmond. The text of H.R. 2211, as amended by the

Senate, was later substituted for the text of H.R. 5316, 99th Cong., 2d Sess (1986), and, in that form, became the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986. In the course of that process, Senator Hatch noted that "[t]his bill allows a bankruptcy court to take any action on its own, or to make any necessary determination to prevent an abuse of process and to help expedite a case in a proper and justified manner." 132 Cong. Rec. 28610 (daily ed. Oct. 3, 1986).

This Court has made clear that the making of objectively unreasonable claims constitutes an abuse of the judicial process. For example, Fed. R. Civ. P. 11 requires that "[p]leading[s], motion[s], and other paper[s] . . . [be] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . " The standard is one of objective reasonableness, and "the relevant inquiry is whether a specific filing was, if not successful, at least well founded." *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 111 S.Ct. 922, 934 (1991). In *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2456 (1990), the Court characterized the filing of papers which violate the Rule 11 standard as an "abus[e of] the judicial process," holding that "the imposition of a Rule 11 sanction . . . requires the determination of a collateral issue: whether the attorney has *abused the judicial process*, and, if so, what sanction would be appropriate." (Emphasis added). *Accord*, *Business Guides*, 111 S.Ct. at 928-29. Consequently, when a debtor claims an exemption for which there is no colorable legal basis, such conduct constitutes an "abuse" of the bankruptcy process which the bankruptcy court may prevent by disallowing the

claimed exemption. Indeed, a number of lower federal courts have specifically relied upon Section 105(a) in holding that bankruptcy courts may disallow frivolous exemption claims even when no one has objected to such claims within the periods prescribed by Bankruptcy Rule 4003(b) or by local rule. *See, e.g., Ragsdale v. Genesco, Inc.*, 674 F.2d 277, 278 (4th Cir. 1982) (holding that where a local bankruptcy rule required that any objection to claimed exemptions be made within 15 days, and no one objected within the 15-day period, Section 105(a) nonetheless gave the bankruptcy court the authority to deny the claimed exemption); *In re Staniforth*, 116 Bankr. 127, 131 (Bankr. W.D. Wis. 1990) (holding that where the trustee failed to object to a claimed exemption within the thirty-day period prescribed by Bankruptcy Rule 4003(b), the bankruptcy court may still inquire into the merits of the claimed exemption because under Section 105, "the Bankruptcy Court may take any action to prevent an abuse of process"); *In re Budinsky*, 1991 WL 105640, at *2 (W.D. Pa. 1991) (WESTLAW, Allfeds) (holding that even where the parties in interest have failed to object to a claimed exemption, Section 105 authorizes the bankruptcy court to "strike improperly claimed exemptions, sua sponte" in order "to enforce the Bankruptcy Code and prevent any abuse of process").

Moreover, to construe Section 522(*l*) in the manner suggested by the court below would create manifest inequities between the treatment of debtors and creditors under the Bankruptcy Rules. Under Bankruptcy Rules 4003(a) and 1007(c), a debtor must file a list of exempt property on its schedule of assets, and (in a voluntary case) the schedule of assets must

be filed within 15 days after the filing of the petition. The Bankruptcy Rules allow great latitude to the debtor in amending those schedules while the bankruptcy proceeding is pending. Bankruptcy Rule 1009(a) provides that the debtor may amend its schedule of assets "as a matter of course at any time before the case is closed." While the Bankruptcy Rules were obviously designed to impose stricter limits on the creditors than on the debtor, construing Section 522(*l*) and Bankruptcy Rule 4003(a) to impose an absolutely rigid rule as to objections would, under these circumstances, be anomalous.

Even the court below acknowledged the importance of "safeguards" which "ensure that debtors have little or no incentive to claim all of their property as exempt." Pet. App. 14a. The court below suggested that "the primary deterrent against debtors engaging in bad faith exemption claims" is Bankruptcy Rule 9011, "which is analogous to Rule 11 of the Civil Rules . . . " and which supposedly "forbids bad faith exemption claims and authorizes sanctions for violation of this prohibition." *Id.*

However, Bankruptcy Rule 9011 does *not* authorize sanctions for groundless or "bad faith" exemption claims and cannot be, as the court below suggested, "the primary deterrent" against making such claims. Pet. App. 14a. Under the Bankruptcy Rules, a debtor claims exemptions by listing them "on the schedule of assets required to be filed by Rule 1007." Bankruptcy Rule 4003(a). But Bankruptcy Rule 9011(a), which requires that certain documents be signed, and authorizes sanctions when the document is not "warranted by existing law or a good faith

argument for . . . [altering] existing law," is by its own terms not applicable to "list[s], *schedule[s]*, or statement[s], or amendments thereto . . . " Bankruptcy Rule 9011(a) (emphasis added). *See also In re Muscatell*, 116 Bankr. 295, 298 (Bankr. M.D. Fla. 1990); *In re Alderson*, 114 Bankr. 672, 677 (Bankr. D. S.D. 1990).[12]

Accordingly, as a practical matter, construing Section 522(*l*) as the court below did *would* encourage debtors "to claim all property as exempt in the hope that no party in interest would object." It is undoubtedly for just such reasons that Congress enacted Section 105(a), which permits bankruptcy courts to prevent such abuses of the judicial process. When Section 522(*l*) is construed in the manner required by Section 105(a), it becomes clear that the approach adopted by the Fifth, Sixth, and Eighth Circuits is the correct one. Even if no party in interest has objected to a claimed exemption within the thirty-day period prescribed by Bankruptcy Rule 4003(b), a bankruptcy court may disallow the claimed

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[12]It is true that under Bankruptcy Rule 1008, "[a]ll petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 USC § 1746," which requires the declarant to state "under penalty of perjury" that the contents of the document are "true and correct." 28 U.S.C. § 1746 (1988). But rarely, if ever, would a debtor be guilty of "perjury" for claiming a legally groundless exemption. One is only guilty of "perjury" under 18 U.S.C. § 1621 if he or she "willfully subscribes as true any material matter which he does not believe to be true." 18 U.S.C. § 1621(2) (1988). Yet one might easily make a legally groundless claim without "willfully" lying about material facts.

exemption if there was no colorable legal basis for claiming it.

II. DAVIS CLEARLY HAD NO COLORABLE STATUTORY BASIS FOR CLAIMING THE ENTIRE PROCEEDS OF THE TWA LAWSUIT AS EXEMPT, AND THUS THE BANKRUPTCY COURT WAS JUSTIFIED IN DENYING A PORTION OF THE CLAIMED EXEMPTION

Under the Bankruptcy Code, Taylor was entitled to select either the federal exemptions listed in Section 522(d) or, alternatively, exemptions which were available under state or other law. 11 U.S.C. § 522(b). When Davis filed her bankruptcy schedules on October 24, 1984, she elected to claim the federal exemptions listed in Section 522(d) and claimed an exemption for the entire proceeds of her lawsuit against TWA. Jt. App. 17-18. Specifically, she claimed an exemption for "[p]roceeds from lawsuit - Winn v. TWA / Claim for lost wages." *Id.* at 18. However, it was clear when she filed her schedules that only a limited portion of the proceeds recovered could be exempted under Section 522(d).

The claim in question was filed with the Pittsburgh Commission on Human Relations ("Commission") in April, 1978. On December 16, 1980, the Commission awarded Davis "lost wages representing the difference between her salary as a Reservations Sales Representative and the salary of a Senior Sales Representative, the position she was denied because of unlawful discrimination from the period March, 1976 until the date TWA no longer employed Senior Sales Representatives in its

Pittsburgh office [1980]."[13] Jt. App. 3. The Commission characterized its award as a "back pay" award.[14] The amount of this award for back pay was at that time undetermined, but was estimated in the approximate amount of $11,000 (without interest).[15] TWA appealed the Commission's decision to the Allegheny County Court of Common Pleas, which, on September 23, 1981, reversed the Commission's decision and held that TWA was not liable to Davis. App. 111. However, on June 27, 1983, the Pennsylvania Commonwealth Court reinstated the Commission's award, again characterizing it as an award for "back pay." App. 115, 125.

There is no basis under Section 522(d) for exempting "back pay" awards except to the extent that the award qualifies for the catch-all exemption for "any property" in Section 522(d)(5) which was

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[13]As respondents have conceded in their Third Circuit brief, "[i]t was . . . uncontroverted at trial that TWA no longer employed Senior Sales Representatives in Pittsburgh after 1980." Brief, at 19.

[14]*See* App. 102 (noting that no additional "back pay" would be awarded for TWA's conduct in refusing to promote Davis to the Team Coordinator or Cargo Account Executive positions).

[15]In the estimate of Davis' damages which the respondents prepared in May, 1987, they calculated her lost earnings for the period 1976-1980 at $11,223 (not including interest). Jt. App. 31. *See also* Brief, at 19 (stating that "if the Commission did not change it's [sic] position on damages, the maximum Miss Davis would be entitled to would be $11,219 (wage losses from March, 1976 through 1980)").

available to Taylor in the amount of $3,950.[16] There was thus no basis for claiming an exemption for the Commission's entire original award. Moreover, when on October 24, 1984, Davis filed her bankruptcy petition and her claim of exemption, she apparently viewed her Commission claim as then having a value in the area of $100,000 -- far in excess of the $11,000 claimed for back pay through 1980.[17] The two additional components of that claim were for (1) additional back pay between the date of the Commission's award (December 16, 1980) and the date on which Davis filed her bankruptcy petition (October 24, 1984) -- which was later claimed to be in excess of $60,000 [18] and (2) for lost wages which might accrue after the filing of the petition (front pay).

While the front pay (post-petition) portion of such excess recovery would have been exempt as "payment

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[16]Section 522(d)(5) provides an exemption in the total amount of $4,150. As respondents have conceded, Davis used $200 of this exemption elsewhere, and thus would be entitled to exempt only $3,950 of the lawsuit proceeds under Section 522(d)(5). Brief, at 30.

[17]This amount would have been increased by the inclusion of interest. Either Davis or the attorney representing her in the bankruptcy proceeding estimated, on January 4, 1985, that the lawsuit was worth $90,000. Jt. App. 26; App. 232-233. And an associate with respondents' firm, who was representing her in the TWA lawsuit, estimated, in a letter dated January 9, 1985, that the lawsuit was worth $110,000. Jt. App. 28.

[18]In the estimate of Davis' damages which respondents submitted to TWA in May of 1987, they calculated lost wages for the period 1981-1984 at $61,823 (without interest) and $78,723 (with interest). Jt. App. 31.

in compensation of loss of future earnings of the debtor . . . ," 11 U.S.C. § 522(d)(11)(E), the additional back pay component was, of course, not exempt.

Consequently, when Davis filed her bankruptcy petition in 1984, she must have been aware that the Commission's award was for back pay, which was not exempt as such, and that the back pay component of any further award also was not exempt. Yet she claimed the entire award as exempt. There is no basis for respondents' contention that the exemption was claimed in good faith.

Respondents argue that after the date of the claimed exemptions Taylor entered into a settlement with TWA, and that the amounts paid in settlement were exempt. If the original claim of exemption were read in the light of this subsequent history, as the lower courts appeared to do,[19] there was still no basis for claiming the entire claim as exempt.

The settlement was reached almost three years after Davis filed her bankruptcy petition, and before the Commission had held any hearings on damages. TWA agreed to settle all claims which Davis might have against it for a total of approximately $110,000. Jt. App. 41-42. According to the recitations contained in the settlement agreement, $23,483.75 (less applicable withholding taxes) was paid to Davis "as and for back pay or front pay" and $23,483.75 "as and

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[19] *See* Pet. App. 25a-27a, 41a-42a.

for all alleged tort claims or any other claims not represented [sic] asserted wage losses."[20]

The only portion of such an award that could be exempt under the Code would be the portion qualifying for the "any property" exemption ($3,950) and the portion attributable to lost post-petition wages, or "front pay." There is no exemption either for back pay or tort claims.[21] Thus, even if one were to assume that Davis envisioned such a settlement when she filed her bankruptcy schedules, the fact remains that Davis had no colorable grounds for exempting either the "back pay" or "tort claims" portions of the settlement (except for the $3,950 which she was entitled to exempt under Section 522(d)(5)). The Bankruptcy Court therefore had the authority, under Sections 105 and 522(*l*) of the Bankruptcy Code, to deny an exemption for $23,483.75 of the

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[20]Jt. App. 42. In addition, $63,032.50 of the settlement was characterized as being "as and for attorneys' fees and expenses in connection with the above-recited case . . . ." *Id.* The courts below did not determine whether this last portion of the settlement was property of the estate (or, as such, exempt), because, as the Bankruptcy Court pointed out, "[r]equiring Defendants to return the $23,483.75 portion of the settlement for averred tort losses will produce a *res* sufficient to pay all of Debtor's creditors, with interest . . . ." Pet. App. 42a.

[21]Contrary to respondents' contention (Brief, at 32), the "tort claims" portion of the settlement was not paid to compensate Davis for lost pension benefits and thus was not exemptible under 11 U.S.C. § 522(d)(10)(E). First, the District Court found that this portion of the settlement was not paid for pension benefits. Pet. App. 26a n.3. Second, Davis, in her bankruptcy schedules, characterized this as a "claim for lost wages." Jt. App. 18.

settlement proceeds, because by doing so it prevented an abuse of the bankruptcy process.[22]

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[22]Indeed, the Bankruptcy Court was, if anything, overly generous to Davis in denying only the $23,483.75 exemption claimed for "tort claims." Davis was not entitled either to exempt the "tort claims" portion of the settlement *or* the portion of the settlement which was for "back pay."

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

GARY W. SHORT
Suite 2317
Koppers Building
Grant Street & Seventh Avenue
Pittsburgh, PA 15219
(412) 765-6100

TIMOTHY B. DYK
(Counsel of Record)
STEPHEN J. GOODMAN
PATRICK J. POTTER
DARRYL R. MARSCH
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

PETER M. LIEB
JONES, DAY, REAVIS & POGUE
599 Lexington Avenue
New York, NY 10022
(212) 326-3939

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No. 91-571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT J. TAYLOR, Trustee,
Petitioner,

v.

FREELAND & KRONZ, a Partnership; WENDELL G. FREELAND; and RICHARD F. KRONZ,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF FOR RESPONDENTS

PHILLIP S. SIMON
(*Counsel of Record*)
KENNETH P. SIMON
SIMON & SIMON
2400 Koppers Building
Pittsburgh, PA 15219
(412) 261-3355

Counsel for the Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a trustee, who has never objected to the debtor's claim of exemption, may attack that claim of exemption, years after the debtor's discharge, when § 522(l) of the Bankruptcy Code provides, unless a party in interest objects, what is claimed as exempt is exempt.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the court below were: Robert J. Taylor, as Trustee in the bankruptcy proceeding of Emily Davis; Freeland & Kronz, a partnership; Wendell G. Freeland; and Richard F. Kronz.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-571

ROBERT J. TAYLOR, Trustee,

Petitioner,

v.

FREELAND & KRONZ, a Partnership; WENDELL G. FREELAND; and RICHARD F. KRONZ,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF THE RESPONDENTS

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (Appendix to the Petition for Certiorari

["Pet. App."], at 1a) is reported at 938 F.2d 420. The memorandum opinion of the United States District Court for the Western District of Pennsylvania (Pet App. 18a) is reported at 118 Bankr. 272; its order affirming the judgment of the bankruptcy court is unreported (Pet. App. 16a). The memorandum opinion of the United States Bankruptcy Court for the Western District of Pennsylvania (Pet. App. 30a) is reported at 105 Bankr. 288; its judgment (Pet. App. 28a) is reported at 105 Bankr. 294.

JURISDICTION

The court of appeals entered its judgment on July 9, 1991. The Petition for Writ of Certiorari was timely filed on October 7, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)(1988).

STATUTES AND RULES INVOLVED

Section 105 of the Bankruptcy Code, 11 U.S.C. § 105 (1988), provides in pertinent part:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Section 522 of the Bankruptcy Code, 11 U.S.C. § 522 (1988), provides in part:

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is --

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant by the entirety or joint tenant is exempt from

process under applicable nonbankruptcy law.

* * *

(d) The following property may be exempted under subsection (b)(1) of this section:

(1) The debtor's aggregate interest, not to exceed $7,500.00 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $1,200 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $200 in value in any particular item or $4,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $500 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value $400 plus up to $3,750 of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $4,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive --

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;
(B) a veteran's benefit;
(C) a disability, illness, or unemployment benefit;
(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the

support of the debtor and any dependent of the debtor, unless --

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
(ii) such payment is on account of age or length of service; and
(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

(11) The debtor's right to receive, or property that is traceable to --

(A) an award under a crime victim's reparation law;
(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor an any dependent of the debtor;
(D) a payment, not to exceed $7,500, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or
(E) a payment in compensation of loss of future

earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

* * *

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

Section 1621 of Title 18 of the United States Code, 18 U.S.C. § 1621 (1988), provides in part:

Whoever -

* * *

(2) In any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true:

is guilty of perjury shall, except as otherwise expressly provide by law, be fined not more than $2,000 or imprisoned not more than five years, or both. . . .

Rule 1007, Federal Rules of Bankruptcy Procedure, provides in part:

(c) Time Limits. The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter, except as otherwise provided in subdivisions(d), (e), and (h) of this rule. . . . Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected pursuant to §705 or appointed pursuant to § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

Rule 1008, Federal Rules of Bankruptcy Procedure, provides:

All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.

Rule 1009, Federal Rules of Bankruptcy Procedure, provides in part:

(a) General Right to Amend. A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

Rule 4003, Federal Rules of Bankruptcy Procedure, provides in part:

(a) Claim of Exemptions. A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. If the debtor fails to claim exemptions or file the schedule within the time specified in Rule 1007, a dependent of the debtor may file the list within 30 days thereafter.

(b) Objections to Claim of Exemptions. The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person.[1]

(c) Burden of Proof. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.

Rule 9006(b)(3), Federal Rules of Bankruptcy Procedure, provides in part:

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[1] The phrase "or supplemental schedules" was added to subsection (b) by the amendments to the Bankruptcy Rules, effective August 1, 1991.

(3) Enlargement Limited. The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.

Rule 9011, Federal Rules of Bankruptcy Procedure, provides in part:

(a) Signature. Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or a party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable

expenses incurred because of the filing of the document, including a reasonable attorney's fee.

STATEMENT OF FACTS

This case presents the question of whether a trustee may recover property has been claimed as exempt when no one has ever objected and § 522(l) of the Bankruptcy Code, provides "unless a party in interest objects, what is claimed as exempt is exempt."

The property claimed as exempt was Emily Davis' ("Davis" or "debtor") pending lawsuit alleging employment discrimination against Trans World Airlines ("TWA"). In April of 1978, Davis filed a Complaint with the Pittsburgh Commission on Human Relations ("Commission"), alleging that TWA had discriminated against her by denying her promotions on the basis of her race and sex.

On December 16, 1980, the Commission entered an Order directing TWA to pay Davis "lost wages representing the difference between her salary as a Reservations Sales Representative and the salary of a Senior Sales Representative, the position she was denied because of unlawful discrimination from the period March, 1976 until the date TWA no longer employed Senior Sales Representatives in its Pittsburgh office." Joint Appendix ("Jt. App.") at 3. TWA no longer employed Senior Sales Representatives in the Pittsburgh office after substantial staff reductions in 1980. Jt. App. 59. According to Freeland & Kronz' estimate of damages prepared in May of 1987, Ms. Davis would have been entitled to between $7,665.00 and $11,223.00, depending on date in 1980 that these staff reductions

occurred.[2] Jt. App. 31.

TWA appealed the Commission's decision to the Court of Common Pleas of Allegheny County. Ms. Davis pledged forty-percent (40%) of the any recovery in the case to Freeland & Kronz as attorneys fees under a "contingency fee" agreement. Jt. App. 54. On September 23, 1981, the Court of Common Pleas reversed the Commission's liability decision. Appendix filed with the Third Circuit ("App."), at 111. Davis appealed to the Commonwealth Court of Pennsylvania, which, on June 27, 1983, reversed the Court of Common Pleas and reinstated the Commission's award. App. 125. TWA then filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, which was granted on November 18, 1983. App. 294.

Ms. Davis filed a voluntary petition under Chapter 7 of the Bankruptcy Code ("Code") on October 24, 1984. Jt. App. 55. On the schedules which she filed with her bankruptcy petition, Davis claimed the pending TWA lawsuit as exempt property under § 522(d) of the Code and listed it's value as unknown. Jt. App. 18. Her schedules list total liabilities of $11,270.37. Jt. App. 20.

On November 26, 1984, Petitioner Robert Taylor ("Taylor" or "trustee") was appointed trustee in the bankruptcy proceeding. Jt. App. 55. On January 4, 1985, Taylor conducted the meeting of creditors ("§ 341 meeting") Jt. App. 25. The trustee's handwritten notes made during the meeting, indicate that either Ms. Davis or her bankruptcy counsel said there was a *claim of $90,000.00 in the TWA*

[2] These estimates do not include interest. Jt. App. 31.

lawsuit. Jt. App. 26.

By letter dated January 7, 1985, Taylor advised Freeland & Kronz that he considered "the net proceeds of said suit would be an asset in the bankruptcy estate." He also asked about the status of the litigation. Jt. App. 27. An associate of Freeland & Kronz responded two days later and informed Taylor that "there was no way of ascertaining the value of the case ... other than by calculating back pay ... with interest ... $110,000 ... because of other variables and uncertainties, the possibility of a quick settlement is unlikely." Jt. App. 28.

Neither Taylor nor any creditor objected to the exemptions claimed by Ms. Davis before February 6, 1985, or ever. Jt. App. 55. The trustee didn't object because he thought the TWA lawsuit was a "nullity"; "that there would be no recovery." Jt. App. 58; App. 243. Ms. Davis received a discharge on October 16, 1985. Jt. App. 56.

On November 29, 1984, the Supreme Court of Pennsylvania, by an equally divided vote, affirmed the Commonwealth Court of Pennsylvania's decision in Ms. Davis' favor. Pet. App. 32a; App. 128-129. On March 25, 1985, the Supreme Court of Pennsylvania allowed TWA to reargue its appeal of the Commission's award, but on October 1, 1986, the Supreme Court held that reargument of the appeal had been improvidently granted and dismissed TWA's appeal. App. 141.

After a settlement conference with Commission officials in May of 1987, a hearing on damages was tentatively scheduled for July 9, 1987. App. 344. The

hearing was never held, because the parties settled the case. *Id.* On September 11, 1987, Davis executed a settlement agreement with TWA under which TWA was to pay her and her attorneys: $23,483.75 (less applicable withholding taxes) "as and for back pay or front pay," $23,483.75 "as and for all alleged tort claims or any other claims not represented [*sic*] asserted wage losses," and $63,032.50 "as and for attorney's fees and expenses ..." Jt. App. 42. The "back pay" portion of the settlement was paid directly to Emily Davis by TWA. App. 93, 275-276. Freeland & Kronz expended approximately $69,000.00 in time on the TWA lawsuit, billed at their hourly rate. Jt. App. 50. They retained $36,500.00 in cash and $7,500.00 in "travel vouchers" as their fee in the case. App. 49. *See also* Jt. App. 56.

In October, 1988, Taylor filed a complaint against Davis, Freeland & Kronz, Freeland, and Kronz seeking to recover $79,016.25 of the TWA settlement for the bankruptcy estate. App. 8-17. The trustee did not seek to recover the "back pay" portion of the settlement. App. 11-17. At trial, the only "expert" testimony on the "fair market value" of the TWA lawsuit was that of Richard Kronz and Wendell Freeland. They testified that the "fair market value" of the lawsuit, as of October 24, 1984, was $5,000 and $10,000, respectively. App. 358, 133-134; App. 369, 131, 132.

The bankruptcy court ordered that the defendants "return" $23,483.75 (plus interest) to the trustee. It held that (1) § 522(l) implicitly requires there be a statutory basis for the claimed exemption before the failure of any party in interest to timely object has effect, (2) § 522(l) incorporates by reference the provisions of § 522(b), which limits

exemptions to those available under federal, state, or local law, (3) there was "no statutory basis" under § 522(d) for exempting a "tort recovery", and (4) certain debtors of questionable integrity may be encouraged to claim all of their property as exempt in the hope that the trustee would fail to object. Pet. App. 38a-41a.

The district court affirmed the bankruptcy court's decision and followed its analysis. Pet. App. 18a-27a.

The Third Circuit reversed and held "in absence of an objection ... property claimed as exempt by the debtor is exempt. Pet. App. 9a. It also held that (1) the text of § 522(l) and Bankruptcy Rule 4003(b) "admits of no exceptions to the bright-line procedural rule," (2) "[n]othing in the legislative materials suggests that any exceptions to this bright-line rule were intended," (3) "the evolution of the bankruptcy laws suggests that Congress intended to shift the burden of objection from the debtor to the other parties in interest," (4) as a matter of policy, "[t]he time limits and obligations established by § 522(l) and Rule 4003(b) serve the dual purposes of finality and certainty," (5) Bankruptcy Rule 9011 "authorizes sanctions" for bad-faith exemption claims and "should act as the primary deterrent" against such crimes, and (6) § 522 (b) is not rendered superfluous by a literal reading of § 522(l), the bankruptcy court's reading of the statute would render § 522(l) meaningless. Pet. App. 11a-14a.

SUMMARY OF ARGUMENT

Section 522(l) of the Bankruptcy Code provides that "unless a party in interest objects, the property claimed as exempt ... is exempt." This language suggests no ambiguity; the legislative history of this provision suggests no contrary intention. The Bankruptcy Rules provide a strict thirty-day time limit for objecting to the debtor's claim of exemption and enlargement of this time period is severely limited. No one ever objected to Ms. Davis' claim of exemption in the TWA lawsuit. The exemption claim and objection procedure of the Code and Rules furthers the primary policy of bankruptcy law, that of a "fresh start" for the debtor.

Petitioner's argument that § 105(a) of the Code provides the authority for modifying the plain language of § 522(l) of the Code ignores the express limitation in the text of § 105(a); the limitation that the court's action is "necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." Following the unambiguous Code and Rule provisions cannot, per se, be an "abuse of process." This argument also ignores the settled principle that the bankruptcy court must exercise its equity powers within the confines of the Code.

Petitioner's §105(a) argument is asserted late; it was not argued below nor in the Petition for Certiorari. Petitioner specifically relies on a 1986 amendment to § 105(a) which became effective in mid-1987. The amendment is not applicable to the debtor's claim of exemption in this case; that property was exempt over two years earlier under the plain language of § 522(l).

Petitioner's argument that the debtor's claim of exemption did not have a "colorable basis" is irrelevant and ignores the trustee's opinion of the value of the claim at the time he could have objected, the uncontroverted trial testimony and the undisputed uncertainties of the case on the date of the bankruptcy filing.

Freeland & Kronz should be allowed to retain their fee for producing something which the trustee, *now*, feels is valuable.

ARGUMENT

I. THE LANGUAGE AND HISTORY OF SECTION 522(l) OF THE BANKRUPTCY CODE AND RELATED RULES ARE CLEAR AND UNAMBIGUOUS - UNLESS OBJECTION, A CLAIM OF EXEMPTION IS VALID

A. The Text of the statute is clear

Statutory interpretation begins with language of statute itself. *Pennsylvania Dept. of Public Welfare v. Davenport*, 110 S.Ct. 2126, 109 L.Ed.2d 588, 595 (1990); *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 409 U.S. 296, 300, 109 S.Ct. 1814, 1818, 104 L.Ed.2d 318, 326 (1989).

The rationale for starting with the language of the statute is "there is no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to it's wishes." *United States v. American*

Trucking Assns., Inc., 310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345, 1350-1351 (1940). *See Caminetti v. United States*, 242 U.S. 470, 490, 37 S.Ct. 192, 196, 61 L.Ed. 442, 455 (1917); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973, 980-981 (1982).

Section 522(l) of the Code provides in part:

> The debtor shall file a list of property that the debtor claims as exempt ... *(U)nless a party in interest objects, the property claimed as exempt on such list is exempt.*

11 U.S.C. § 522(l)(1988). (Emphasis added.)

This provision sets up a simple procedure for determining what property of the debtor is exempt - the debtor makes a claim of exemption, a party in interest may object.[3] The text does not specify the procedure if an

[3] By use of the term "claim" and by setting up a claim - objection procedure, Congress clearly assumes that debtors may sometime make claims of exemption that are incorrect or legally defective. The procedural remedy for an invalid claim is objection. The trustee or any creditor may object. Federal Rule of Bankruptcy Procedure 4003(b).

objection is made[4], it clearly specifies the result if there is no objection.

Initially, the Court employs a two part inquiry in construing statutes:

1) Has Congress spoken on the subject?

In construing statutes, the Supreme Court begins with language of statute and asks whether Congress has spoken on subject. *Norfolk and Western Ry. Co. v. American Train Dispatchers Assn.* 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991); and

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[4] The procedure once an objection is filed is set forth in Federal Rule of Bankruptcy Procedure 4003(b)-(c), which provides in part:

> The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors ... unless, within such period, further time is granted by the court ... After hearing on notice, the court shall determine the issues presented by the objections.

Federal Rule of Bankruptcy Procedure 9006(b)(3) limits the bankruptcy court's authority to enlarge the time for taking action under Rule 4003(b) to "only to the extent and under the conditions states in those rules."

2) if it has spoken, is what Congress said clear[5] or unambiguous?

If intent of Congress is clear, that is end of matter, for the Court must give effect to unambiguously expressed intent of Congress. *Norfolk and Western Ry. Co. v. American Train Dispatchers Assn.*, 111 S.Ct. 1156, 1163, 113 L.Ed.2d 95, 106 (1991).

Congress has spoken on the effect of no objection to a debtor's claim of exemption: "*Unless a party in interest objects, the property claimed as exempt ... is exempt.*"

This language is unambiguous. The text has an almost mathematical precision.[6] It is expressed in absolute terms; Congress delineated no exceptions. Petitioner has not argued otherwise.

When the Court finds the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances, such as where application of the

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[5] Plain meaning of legislation should be conclusive, except in rare cases in which literal application of statute will produce result demonstrably at odds with intention of its drafters; in such cases, the intention of drafters, rather than strict language, controls. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 131, 103 L.Ed.2d 290, 299 (1989).

[6] In mathematical or logical terms, the sentence is a conditional equation: "if N, then C=E," where N=no objection, C= the claim of exemption and E=exempt.

statute as written[7] will produce result demonstrably at odds with intentions of its drafters. *Demarest v. Manspeaker*, 111 S.Ct. 599, 604, 112 L.Ed.2d 608, 616, on remand 930 F.2d 33 (1991). *Burlington Northern R. Co. v. Oklahoma Tax Commn.*, 481 U.S. 454, 461, 107 S.Ct. 1855, 1860 (1987). *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973, 980-981 (1982).

There has been no demonstration that the result produced in this case is at odds with the intention of the drafters. The intention of the drafters, clearly expressed in the language of the statute, was unequivocal. The legislative history confirms it.

B. Legislative History of Section 522(l) is clear

Though legislative history can be legitimate guide to statutory purpose obscured by ambiguity, the language of statute itself must ordinarily be regarded as conclusive, absent any clearly expressed legislative intention to contrary. *Burlington Northern R. Co. v. Oklahoma Tax Commn.*, 481 U.S. 454, 461, 107 S.Ct. 1855, 1860, 95 L.Ed.2d 404, 412 (1987).

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[7] "...where acceptance of that meaning . . . would thwart the obvious purpose of the statute." *Commissioner v. Brown*, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75, 82 (1965); *Helvering v. Hammel*, 311 U.S. 504, 510-511, 61 S.Ct. 368, 371, 85 L.Ed.2d 303, 307 (1941); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973, 980-981 (1982).

The legislative history, while limited[8], contains no contrary intention. The House Report states:

> Subsection (l) requires the debtor to file a list of property that he claims as exempt from property of the estate. *Absent an objection to the list, the property is exempted*. A dependent of the debtor may file it and thus be protected if the debtor fails to file the list.

H.R. Rep. No. 595, 95th Cong., 2d Sess. 363, (1977) *reprinted* in 1978 U.S. Code Cong. & Admin. News 5963, 6319. (Emphasis added.)

The Senate Report is virtually identical, it states:

> Subsection (k) requires the debtor to file a list of property that he claims as exempt from property of the estate. *Absent an objection to the list, the property is exempted*. A dependent

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[8] Congress worked on the formulation of the Code for nearly a decade. It was intended to modernize the bankruptcy laws, see H.R. Rep. No. 95-595, 3 (1977) *reprinted* in 1978 U.S.Code Cong. & Admin.News 5963, 5964-5965, and as a result made significant changes in both the substantive and procedural laws of bankruptcy ... In such a substantial overhaul of the system, it is not appropriate or realistic to expect Congress to have explained with particularity each step it took. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290, 297-298 (1989). *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53, 102 S.Ct. 2858, 2961-2862, 73 L.Ed.2d 598, 603 (1982) (plurality opinion).

> of the debtor may file it and thus be protected if the debtor fails to file the list.

S. Rep No. 989, 95th Cong., 2d Sess. 77, (1977) *reprinted* in 1978 U.S. Code Cong. & Admin. News 5787, 5863. (Emphasis added.)

The reports paraphrase the plain language of § 522(l) of the Code. They express no contrary intention.

C. There are sound policy reasons for a strict exemption procedure

No occasion exists to examine additional considerations of policy that may have influenced lawmakers in the formulation of a statute, if the language or provision is sufficiently clear in its context and not at odds with legislative history. *Rodriguez v. U.S.*, 490 U.S. 522, 526, 107 S.Ct. 1391, 1393, 94 L.Ed.2d 533, 538 (1987).

1. The Code's policy is a "fresh start" for the debtor

One of the primary purposes of bankruptcy is to provide a "fresh start" to debtors. *Perez v. Campbell*, 402 U.S. 637, 649, 91 S.Ct. 1704, 1706, 29 L.Ed 2d 233, 241 (1971).

The House Report to the Code states in part:

> The historic purpose of these exemption laws have been to protect the debtor from his creditors, to provide him with the basic necessities of life so even if creditors levy on all of his non-exempt property, the

> debtor will not be left destitute and a public charge ... (T)he bill continues to recognize the state's interest in regulating credit within the states, but enunciates a bankruptcy policy favoring a fresh start ... Bankruptcy exists to provide relief for an overburdened debtor.[9]

The purpose of exemptions is to allow the debtor to retain a minimal amount of property for his fresh start. *Van Iperen v. Production Credit Assn. of Worthington-Slayton Branch (In re Van Iperen)*, 819 F.2d 189, 191 (8th Cir.1987); *see In re Hindman*, 104 F. 331, 333 (9th Cir. 1900).

The exemption procedure Congress created with §522(l) and Bankruptcy Rule 4003(b)(3) offers certainty and finality which is particularly acute in the bankruptcy context. Pet. App. 12a. This procedural scheme provides certainty for both the debtor and the trustee. The debtor must begin his fresh start and must know what property he has available to this end. The trustee must administer assets according to the Bankruptcy Code; the procedural rules, thus, mandate a conclusion which makes imminently good sense, given the framework which the Code establishes for administering assets of the estate. *Doyle v. Grossman (In re Grossman)*, 80 B.R. 311, 314 (Bankr. E.D.Pa. 1987).

2. The Rules further the Code's policy of a "*fresh* start"

Petitioner suggests that the Third Circuit's construction of § 522(l) would create "manifest inequities" between the

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[9] H.R. Rep. No. 595, 95th Cong., 2d Sess. 126, (1977) *reprinted* in 1978 U.S. Code Cong. & Admin. News 5963, 6087.

treatment of debtors and creditors under the bankruptcy rules because they allow latitude to the debtor in amending his schedules while there are strict time limits on a creditor's objection to the claim of exemption. Petitioner's Brief ("Pet. Brief __."), p. 27-28.

> Rule 4003(b) provides, however, that:
>
> The trustee or any creditor may file objections to the list of property claimed as exempt within thirty days after ... *the filing of any amendment to the list* ...

Federal Rule of Bankruptcy Procedure 4003(b). (Emphasis added.)

If a debtor amends his claim of exemption, a creditor or trustee has thirty days from the date of amendment to object to the claim. The rule, while strict, does allow extension if "within such period further time is granted by the court."[10] The thirty-day time limit is liberal, given other time limits in the bankruptcy rules. For example, under Rule 8002(a), the time period for filing a notice of appeal from any order of the bankruptcy court is ten days.

The drafters of the rules intended a strict time limit for objections to exemptions. Federal Rule of Bankruptcy

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[10] A trustee who was seriously concerned about a claim of exemption could, as an alternative to objection or extension, "continue" the "section 341" meeting. Generally, he is the presiding officer of the meeting. This action would effectively "toll" the running of the thirty day period for objection. The period begins at the "conclusion" of the meeting. *See* Federal Rule of Bankruptcy Procedure 4003(b).

Procedure 9006(b)(3) provides in part:

> The court may enlarge the time for taking action under Rules ... 4003(b) ... *only to the extent and under the conditions stated in those rules.*

(Emphasis added.)

Rule 9006(b)(3) strictly limits the court's authority to enlarge the time limit for objecting to a claim of exemption. The Court should seek to interpret the rules neither liberally nor stingily but only as best we can according to their apparent intent. Where there intent is to provide leeway, a permissive construction is the right one; where it is to be strict, a permissive construction is wrong. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 319, 108 S.Ct. 2405, 2410, 101 L.Ed.2d 285, 293 (1988).

If there is "unequal" treatment of debtors and creditors related to claims and objections to exempt property, the rules clearly intended it.

3. There are Sanctions available for "unwarranted" claims of exemption

Petitioner also argues that the lower court's construction of § 522(l) would encourage debtors to claim all their property as exempt in the hope that no party in interest would object. Pet. Brief 29. This argument ignores all practical considerations.

It is, in reality, the debtor's lawyer who makes a claim to exemption for his client. No debtor's lawyer would

presume that a trustee selected by the Office of United States Trustee would be incompetent to review a debtor's claim of exemption. Even if the trustee missed a spurious claim, all creditors in the case would have to do likewise. In almost all cases, making a spurious claim would be a useless and time consuming activity which could lead to sanctions.

Petitioner argues that Federal Rule of Bankruptcy Procedure 9011(a) would not be a source of sanctions for making unwarranted claims of exemption because the rule is not applicable to "lists, schedules and statements." Pet. Brief 28-29.

This is not a proper construction of Rule 9011(a).

Rule 9011 provides in part[11]:

> [1] *Every petition, pleading, motion and other paper* served or *filed in a case* under the Code on behalf of a party represented by an attorney, *except a* list, *schedule*, or statement, or amendments thereto, *shall be signed by at least one attorney of record* in the attorney's individual name, whose office address and telephone number shall be stated ... [3] *The signature of* an attorney or *party constitutes a certification that* the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information and belief formed after reasonable inquiry

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[11] (Emphasis added.) Full text of this rule is at p. 10, supra. The number of the sentence is included in brackets to aid in comparing this rule with Federal Rule of Civil Procedure 11(a). The relevant portion of Rule 11(a) is listed in the note 13, *infra*.

> it is well-grounded in fact and *warranted by existing law or good-faith argument for the modification or reversal of existing law* . . . [5] If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose sanctions on the person who signed it . . .

The first sentence of Rule 9011(a) specifies what documents shall be signed by an attorney and excludes "lists, *schedules* and statements." Bankruptcy schedules, including schedule "B-4" where the debtor must make his claim of exemption, must be verified or contain an unworn declaration of the debtor. Federal Rule of Bankruptcy Procedure 1008; Official Form 6[12].

The reasonable construction of Rule 9011(a) is that the third sentence of the rule is not limited by the first sentence. The first sentence specifies only what documents an attorney must sign. The third sentence, by its terms, deals with documents a party *or* an attorney signs, *whether required to or not*. A party is subject to sanctions if a claim made in schedule is not warranted by existing law or good-faith argument for the extension, modification or reversal of existing law. An attorney does not have to sign the schedules under the rules, if he does, he is subject to sanctions.

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[12] This is the form Ms. Davis used. Jt. App. 5-21. The Official Forms were substantially revised in amendments to the Federal Rules of Bankruptcy Procedure which became effective on August 1, 1991.

The Court found that this was the proper construction of Federal Rule of Civil Procedure 11(a)[13], which is very similar to Bankruptcy Rule 9011, stating:

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[13] Federal Rule of Civil Procedure 11 provides in part:

> [1] Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. [2] The party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. [3] Except when otherwise specifically provided by rule or statute pleadings need not be verified or accompanied by an affidavit. [4] The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or one witness sustained by corroborating circumstances is abolished. [5] The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry is well-grounded in fact and is warranted by existing law or good-faith argument for extension, modification or reversal of existing law and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in cost of litigation. ... [7] If a pleading, motion, or other rule is signed in violation of this rule, the court, on motion or on its own initiative, shall impose on the person who signed it, a represented party, or both, an appropriate sanction ...

> This *(fifth)*[14] sentence, by its terms governs any signature of "an attorney or a party," thereby making it applicable not only to signatures required by sentences [1], [2], and [3], but also to the signatures that are not required but nevertheless present.

Business Guides Inc. v. Chromatic Communication Enterprises, Inc., 111 S.Ct. 922, 929, 112 L.Ed.2d 1140, 1153 (1991). (Parenthetical added.)

There are other sanctions available in addition to those

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[14] The fifth sentence of Federal Rule of Civil Procedure 11(a) and the third sentence of Federal Bankruptcy Rule of Procedure 9011(a) are nearly identical.

Rule 11(a) provides:[5] The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry is well-grounded in fact and is warranted by existing law or good-faith argument for extension, modification or reversal of existing law and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in cost of litigation.

Rule 9011(a) provides: [3] The signature of an attorney or party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information and belief formed after reasonable inquiry is well-grounded in fact and warranted by existing law or good-faith argument for the modification or reversal of existing law and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation.

available under Rule 9011(a). Section 727(a) of the Code provides in part:

> The court shall grant the debtor a discharge unless -
> (4) the debtor knowingly and fraudulently, in or in connection with the case -
> (B) presented or used a false claim.

11 U.S.C. § 727(a) (1988). In addition, 18 U.S.C. § 152, provides in part:

> Whoever knowingly and fraudulently ... receives or attempts to obtain any money or property ... advantage or promise thereof, for acting or forebearing to act in any case under Title 11 ... shall be fined not more than $5,000 or imprisoned not more than five years or both.

Debtors and their counsel have no incentive to make a spurious exemption claims, it would be a useless activity that could leave them open to numerous sanctions including the denial of discharge, *the very reason for the bankruptcy filing* in most instances.

4. Other policy concerns

The Seventh Circuit expressed another policy concern petitioner has not discussed:

> It would be questionable policy to allow the trustee to hang back while the debtor goes forward with his ... claim and then subsequently object to the inclusion of these claims in exempt property.

In re Brandstaetter, 767 F.2d 324, 328 (7th Cir. 1985).

It would be an outrageous policy to allow the trustee, who never sought to engage Freeland & Kronz to prosecute the lawsuit on behalf of the estate[15], to deprive Freeland & Kronz of their fees for successfully prosecuting the TWA lawsuit.

II. SECTION 105(a) OF THE BANKRUPTCY CODE SHOULD NOT BE CONSTRUED TO MODIFY THE PLAIN LANGUAGE OF SECTION 522(l) AND FEDERAL RULES OF BANKRUPTCY PROCEDURE 4003(b) AND 9006(b)(3).

Petitioners argue that § 105(a) of the Bankruptcy Code should be read to modify § 522(l) and the related time limits for objecting to a claim of exemption ("the § 105 (a) argument"). Pet. Brief 22-28.

A. The § 105(a) Argument is asserted Late in these Proceedings

The Court could decline to consider petitioner's "§ 105(a) argument" as it was not raised below and was not

[15] Jt. App. 59.

raised in the Petition for Certiorari.[16] *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 277, 109 S.Ct. 2909, 2921, 106 L.Ed.2d 219, 239 (1989).

B. The Amendment to § 105(a) was too late to apply to Ms. Davis' claim of exemption

Petitioner specifically argues that the second sentence of § 105(a), authorizes the bankruptcy court to prevent an "abuse of process", like Ms. Davis' claim of exemption.[17] Pet. Brief 25-27. The trustee argues that the second sentence of § 105:

> ... is clearly applicable to this case because § 302(d) of the Act -- which governs, *inter alia*, "[t]he judicial districts established for the State of Pennsylvania" -- provides that amendments which the Act makes to § 105 shall become applicable "to cases while pending

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[16] *See* Taylor's Petition for Writ for Certiorari and Brief of Appellee, Taylor v. Freeland & Kronz, No. 90-3693 (3d Cir. July 8, 1991). The trustee argues that the court below did not even mention § 105(a) of the Bankruptcy Code in its Opinion. Pet. Brief 24. The court below did not mention §105 because no party raised the issue.

[17] Respondents challenge this characterization of Ms. Davis' claim of exemption, *infra*.

in such district"[18] no later than 270 days anter the effective date of the Act (November 26, 1986). 100 Stat. 3120.

Pet. Brief 25.

Ms. Davis claimed her exempt property on October 24, 1984. Jt. App. 55. On January 4, 1985, the trustee conducted a "§ 341(a) meeting" which was attended by Ms. Davis and her bankruptcy counsel, Alan Berman. Jt. App. 55. Rule 4003(b) requires that objection be made "within 30 days after the conclusion of the meeting of creditors ... unless, within such period further time is granted by the court." Neither the trustee nor any party in interest ever objected to the debtor's claim of exemption. Jt. App. 55.

On February 6, 1985, over two years before the amendment to § 105(a) became effective, under the mandate of § 522(l) of the Code, the debtor's claim of exemption "was exempt." On October 16, 1985, Ms. Davis received a discharge by Order of the Bankruptcy Court. Jt. App. 56. The court did not raise a "sua sponte" objection to the

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[18] The actual language of Section 302 of Pub. L. 99-554 provides in part:

The amendments made by subtitle A of title II of this Act [... amending sections ... 105 ...of Title 11] ... *shall not*--
(i) become effective in or with respect to a judicial district ... until, or
(ii) *apply to cases while pending in such district before*, the expiration of the 270 day period beginning on the effective date of this Act ...

100 Stat. 3088, 3120 (1986). (Emphasis added.)

exemption claim nor was the time period for objection enlarged by the court before February 6, 1985, pursuant to Rule 9006(b)(3).[19]

Even if § 105(a) were construed to enlarge the time for objecting under Rule 4003(b), the Court would have to retroactively apply the second sentence of § 105(a) to reach the result urged by the trustee. Congressional enactments will not be construed to have retroactive effect unless their language requires this result. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988).

C. Following the Code and Rules is, *per se*, not an "abuse of process"

The plain language of § 105(a) does not support petitioner's construction. It provides:

> The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination *necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process*.

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[19] Rule 9006(b)(3) provides in part:

The court may enlarge the time for taking action under Rules ... 4003(b) ... only to the extent and under the conditions stated in those Rules.

11 U.S.C. § 105(a)(1988). (Emphasis added).

The first part of the second sentence of § 105(a) is limited by the later phrase "necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

The bankruptcy court took no "sua sponte" action on the debtor's claim of exemption. There was no prior court order to enforce. The bankruptcy court issued an opinion and order in an case commenced over three and a half years after the objection period had run under the rules.

The court's action is not necessary or appropriate to enforce or implement the rules, it was in clear violation of Rule 4003(b) and 9006(b)(3).

Petitioners argue that it was, however, necessary or appropriate to prevent an "abuse of process." Pet. Brief 25. The trustee admits that the term "abuse of process" is not defined in the Code and that the legislative history "suggests that Congress wished to clarify the broad powers of bankruptcy courts to protect the integrity and effectiveness of the process." Pet. Brief 25.

Following the plain meaning of the rules and the Code, is not, by definition, an "abuse of process".[20] The Code and rules were designed to protect the integrity and

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[20] If anything, ignoring the Code and rules is an "abuse of process". "Abuse of process is often defined under state law as a "perversion of the of the court system". *See e.g. Baird v. Aluminum Seal Co.*, 250 F.2d 595 (3d Cir. 1958).

effectiveness of the bankruptcy process; they are the "process".

D. Congress did not amend § 522(l) of the Code when they amended § 105(a)

Petitioners further argue that:

> Construing 522(*l*) as the court did below would encourage the debtors "to claim all property as exempt in the hope that no party in interest would object." It is undoubtedly for just such reasons that Congress enacted § 105, which permits bankruptcy courts to prevent such abuses of the judicial process.

If Congress wanted to modify the objection procedure to remedy an alleged evil they saw in it, they would have undoubtedly amended § 522(l) of the Code when they amended § 105(a). They did not.

The Court assumes that Congress is aware of existing law when it passes legislation. *Miles v. Apex Marine Corp.*, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). The purpose of a statute includes not only what it sets out to change but also what it resolves to leave alone. *West Virginia Univ. Hosp., Inc. v. Casey*, 111 S.Ct. 1138, 1147, 113 L.Ed.2d 68, 83 (1991); *Rodriguez v. United States*, 490 U.S. 522, 526, 107 S.Ct. 1391, 1393, 94 L.Ed.2d 533, 538 (1987).

E. The Legislative History of § 105(a) of the Code is general

The purpose of § 105(a) is to confirm that the

bankruptcy court retains its traditional equity powers under the Code.

The House Report provides in part:

> Section 105 is derived from § 2(a)(15) of present law with two changes ... § 105 is similar in effect to the All Writ Statute ... this section is *repeated here for the sake of continuity from current law* and ease of reference, and to *cover any powers traditionally exercised by a bankruptcy court* that are not encompassed by the All Writ Statute.

H.R.Rep. No. 595, 95th Cong., 2d Sess. 316 (1977) *reprinted* in 1978 U.S.Code Cong. & Admin. News 5963, 6273-6274. (Emphasis added.)

The amendment to § 105(a) has a sparse legislative history. Petitioner quotes the remark of Senator Hatch[21] that:

> This bill allows the Bankruptcy Court to take any action on its own, or to make any necessary determination to prevent an abuse of process and to help expedite a case in a proper and justified manner.. 132 Cong. Rec. 28610 (daily ed. Oct. 3, 1986).[22]

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[21] The Court does not permit the unambiguous language of a statute to be expanded or contracted by the statements of individual legislators or committees during the enactment process. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989).

[22] Pet. Brief 26.

To ignore § 522(l) of the Code can not be called "proper and justified". To ignore the strict time limits of the Rules will not "expedite a case". This case is a good example.

Ms. Davis has been denied the "fresh start" the bankruptcy laws purported to offer her.[23] This is not "expedited" treatment. Petitioner's construction of the Code and Rules will not expedite cases, it will have the opposite effect.

The equity powers of the bankruptcy courts have limits. They "must and can only be exercised within the confines of the Bankruptcy Code." *In re Northwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 968-969, 99 L.Ed.2d 169, 179 (1988). Section 105(a) cannot properly be read to ignore the clear provisions of the Code and rules; it contains an express limitation to prevent such a construction.

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[23] Ms. Davis had her bank account attached shortly before Christmas of 1991 pursuant the judgement which, effectively, denied her the exemption claim she made seven years earlier. Ms. Davis may be forced into a second bankruptcy in an attempt limit the adverse impact of her first bankruptcy. *Fresh start, indeed!*

III. EMILY DAVIS' CLAIM OF EXEMPTION WAS IN GOOD FAITH BECAUSE THE AMOUNT, IF ANY, OF A RECOVERY FROM TWA WAS UNCERTAIN.

A. *"Albeit barely"* [24] - The Liability Aspect of the TWA Lawsuit was uncertain on October 24, 1984; the Trustee thought so.

Now armed with the benefit of perfect hindsight[25], petitioner argues:

> (I)t was clear when she *(Davis)* filed her schedules that only a limited portion of the proceeds recovered could be exempted under § 522(d).

Pet. Brief 30. (Parenthetical added.)

Property claimed as exempt is valued as of the date of the filing of the bankruptcy petition. Section 522(a)(2) of the Code states, in part: " In this section- ... "Value" means fair market value as of the date of the filing of the petition ... 11 U.S.C. § 522(a)(2)(1988).

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[24] A phrase used by Justice Hutchinson of the Supreme Court of Pennsylvania to describe the sufficiency of the evidence to support the finding of discrimination in the TWA lawsuit. Jt. App. 24; App. 130.

[25] The trustee's ability predict the outcome of the TWA lawsuit is significantly improved now that he knows the result of the case. ***But see***, his trial testimony wherein he describes the TWA lawsuit as a "nullity". Jt. App. 58.

Ms. Davis filed her bankruptcy petition on October 24, 1984. Jt. App. 55. As of her bankruptcy filing, the liability and damages aspects of Ms. Davis' lawsuit were uncertain. On October 24, 1984, Ms. Davis' liability case was on appeal to the Supreme Court of Pennsylvania. App. 360. The liability case had a "seesaw" history prior to the Supreme Court of Pennsylvania's allowance of appeal.[26] Ms. Davis had seen the liability determination in her case reversed once by October 24, 1984. She knew the outcome of her case was uncertain; she claimed the value of the TWA lawsuit as "unknown" in her Schedule B2 and B4. Jt. App. 15, 18.

Petitioner has repeatedly argued that, as of her bankruptcy filing, Ms. Davis "apparently viewed her Commission claim as having a *value* in the area of $100,000.00." Pet. Brief 32.[27]

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[26] The Pittsburgh Commission on Human Relations had found in Ms. Davis' favor. Pet. App. 32a; App. 101-102. The Commission's decision was reversed by Opinion and Order of Judge Papadakos of the Court of Common Pleas of Allegheny County, Pennsylvania on September 23, 1981. Pet. App. 32a; App. 103, 111. The Commonwealth Court reversed the decision of the Court of Common Pleas and reinstated the decision of the Commission on June 27, 1983. Pet. App. 32a; App. 112, 127. On October 24, 1984, former Judge Papadakos, who had reversed the Commission's Order, was now sitting as a Justice of the Supreme Court of Pennsylvania.

[27] Petitioner relies, in Note 4 and 17 of his Brief, on the bankruptcy court's "finding" that "either Ms. Davis or the attorney representing her in the bankruptcy proceeding estimated, on January 4, 1985, that the lawsuit was worth $90,000.00" *But see*, Jt. App. 26; App. 232-233.

There is no support in the record for this assertion. Neither Ms. Davis nor her bankruptcy attorney estimated that the TWA lawsuit was worth $90,000.00 at the "§ 341 meeting." The bankruptcy court was simply mistaken on this issue. The trustee's handwritten notes, made during the § 341 meeting, indicate that either Ms. Davis or her bankruptcy counsel said there was a *claim of $90,000.00 in the TWA lawsuit*. Jt. App. 26. The trial testimony indicates the same. App. 232-233.

The trustee shared Ms. Davis' view that the outcome of the case was uncertain. When he was asked whether there was any discussion at the "creditors' meeting" as to why he was going forward with this bankruptcy when he had a potential recovery of $90,000 from the TWA lawsuit, Taylor replied:

> The answer I recall receiving from either from Mr. Berman or Ms. Davis was the uncertainty as to the possible recovery and amount, so with that information, I have had past experience in examining debtors, many of them ... indicate they have potential lawsuits. And many of them do not turn out to be advantageous ...

Jt. App. 52.

At trial, the bankruptcy judge examined the trustee on this issue:

> Q: (By the Court) So you thought about objecting to exemptions, determined not to because this lawsuit might be a nullity. What do you mean by nullity?

A: (Taylor) That there would be no recovery.

Jt. App. 58; App. 243.

Petitioner can not equitably argue that Ms. Davis' claim of exemption in the TWA lawsuit was "improper" or made in "bad faith" when the trustee believed that the lawsuit had little value.[28]

The events after October 24, 1984, confirm that liability on the TWA claim was a "close question". The Supreme Court of Pennsylvania, by an equally divided vote, affirmed the Commonwealth Court's decision in Ms. Davis' favor. Pet. App. 32a; App. 128-129. The deciding vote in Ms. Davis' favor was cast by Justice Hutchinson, who wrote:

> On the particular facts of this case I believe the evidence is sufficient, *albeit barely*, to support the ... Commission's findings of discrimination ...

Jt. App. 24; App. 130. (Emphasis added).

Liability was not finally established until October 1, 1986, because, after the November 29, 1984 decision, the Pennsylvania Supreme Court granted TWA's Application for Reargument "out of time". The case was reargued on September 26, 1986. Pet. App. 32a. The Supreme Court

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[28] If the trustee considered the claim had little value, Ms. Davis' chances of a bank buying her claim or allowing her to borrow against her claim were minimal; so therefore, was the "fair market value" of her claim.

then dismissed the appeal on October 1, 1986. Pet. App. 33a.

B. *"Dead in the water"* [29] - On October 24, 1984, Ms. Davis' Damages In the TWA Lawsuit were Limited.

On October 24, 1984, the damages aspect of the TWA case was also uncertain. The Commission's Order of December 16, 1980, directed TWA to pay Ms. Davis:

> Lost wages representing the difference between her salary as a Reservations Sales Representative and the salary of a Senior Sales Representative ... from the period March, 1976 until the date TWA no longer employed Sales Representatives in the Pittsburgh office.

Jt. App. 3. TWA no longer employed Senior Sales Representatives in the Pittsburgh office after substantial staff reductions in 1980. Jt. App. 59. TWA did not provide some of the wage information needed for this calculation of damages until the spring of 1987. App. 298-301.

According to Freeland & Kronz' estimate of damages prepared in May of 1987, Ms. Davis would have been entitled to between $7,665.00 and $11,223.00, depending on

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[29] A phrase that Richard Kronz used to describe the potential effect of the 1980 TWA staff reductions in Pittsburgh on Ms. Davis' damages in the TWA lawsuit. Jt. App. 59.

date in 1980 that these staff reductions occurred.[30] Jt. App. 31.

Petitioner admits that Ms. Davis was entitled to a "catch-all" or "wildcard" exemption for any property up a value of $3,950.00 under § 522(d)(5) of the Code.[31] Pet. Brief 32-33 and Note 16. In addition, Ms. Davis pledged forty-percent (40%) of the recovery to Freeland & Kronz as attorneys fees under a "contingency fee" agreement.[32] Jt.

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[30] These calculations do not include interest. The $7,665.00 figure is arrived at by adding the 1977, 1978 and 1979 "back-pay" figures. Jt. App. 31. The $11,223.00 figure is calculated in the same manner but adds "back-pay" for the entire year of 1980. Jt. App. 31.

[31] The trustee also admitted that the "future earning" or "front pay" portion of the settlement was not property of the estate. Jt. App. 63-64. The only damages claimed in the TWA lawsuit as of May of 1987, other than "front pay" and "attorneys fees", were for "back pay" and "pension loss". App. 339. "Pension loss" is exempt under 522(d)(10)(E) of the Code. The trustee has not sought to recover the "back pay" component of the settlement in this action. App. 11-17. *See also* Note 36, *infra*.

[32] In the lower courts, Respondents argued that Freeland & Kronz had an "equitable charging lien" under Pennsylvania state law which would protect their contingent fee. *See Rect vs. Urban Development Authority*, 402 Pa. 599, 168 A.2d 139 (1961); *Novinger v. E.I Dupont DeNemouers & Co.*, 809 F.2d 212, 218 (3d Cir. 1967); *United States v. Fidelity Philadelphia Trust Co.*, 459 F.2d 71 (3d Cir. 1972); *In re Prudence*, 46 F.2d 157 (2d Cir. 1938). This is a lien which the trustee cannot avoid. *In re Fitterer Engineering Associates, Inc.*, 27 B.R. 878, 880 (Bankr. E.D. Mi. 1983); *In re Life Imaging Corporation*, 31 B.R. 101 (Bankr. D. Colo. 1983); *In re Sea Catch*, 36 B.R. 226, 233 (Bankr.

App. 54.

Based on her attorneys estimate of damages, the 1980 Commission Order, Ms. Davis's entitlement to a "wild card" exemption and Freeland & Kronz' attorneys fee lien, the trustee *may* have realistically recovered, between:

Description	Estimate 1	Estimate 2
Gross Recovery[33]	$ 7,655.00	$11,223.00
Attorneys Fees (40%)	- 2,286.00	- 4,489.00
Subtotal:	$ 4,239.00	$ 6,534.00
"Wild Card" Exemption	- 3,950.00	- 3,950.00
Nonexempt Proceeds	$ 289.00	$ 2,584.00

These estimates do not include out-of-pocket expenses which were $689.51 on settlement. Jt. App. 51. Nor do they include discounting the value of the lawsuit because of uncertain liability.

At trial, the only "expert testimony" on the "fair market value" of the TWA lawsuit was that of Richard Kronz and Wendell Freeland.[34] They testified that the "fair market value" of the lawsuit, as of October 24, 1984, was $5,000

D. Ala 1983). The Third Circuit did not decide this issue. Pet. App. 15a.

[33] The source of the two "gross recovery" figures is explained in Note 30, *supra*.

[34] The trustee stipulated to Mr. Freeland's "expert qualifications" at trial. App. 362.

and $10,000, respectively. App. 358, 133-134; App. 369, 131, 132. No other valuation testimony was presented at trial.[35]

Given the uncertainties of the TWA lawsuit on the date of her bankruptcy filing, Ms. Davis' claim of exemption was made in "good faith". If anything, the trustee's argument to the contrary is not.[36] Depending the fair market value of the lawsuit on October 24, 1984, it is unclear whether the trustee could have recovered anything for the bankrupt's estate, had he objected. He did not.

Freeland & Kronz did not advise Ms. Davis' on her claim of exemption, she was represented by other counsel. Jt. App. 56. Freeland & Kronz simply did their job and they did it well under the circumstances.

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[35] The Third Circuit did not decide whether the bankruptcy court erred in it's valuation finding(s), as respondents alleged. Pet. App. 15a.

[36] The petitioner argues that there is "no basis under § 522(d) for exempting 'back pay' awards ..." Pet. Brief 31. The trustee did not seek to recover the "back pay" portion of the settlement in his adversary proceeding Complaint. App. 11-17. Freeland & Kronz had no "transferee liability" on this portion of the settlement under § 550 of the Code as the "back pay" portion of the settlement was directly paid to Emily Davis by TWA. App. 93, 275-276.

They should be allowed to retain their fees[37] for doing so.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

PHILLIP S. SIMON
(*Counsel of Record*)
KENNETH P. SIMON
SIMON & SIMON
2400 Koppers Building
Pittsburgh, PA 15219
(412) 261-3355

February 11, 1992

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[37] Freeland & Kronz expended approximately $69,000.00 in time on the TWA lawsuit, billed at their hourly rate. Jt. App. 50. They retained $36,500.00 in cash and $7,500.00 in "travel vouchers" as their fee in the case. App. 49. *See also* Jt. App. 56.

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No. 91 - 571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT J. TAYLOR, Trustee,

Petitioner,

v.

FREELAND & KRONZ, a Partnership; WENDELL G. FREELAND; and RICHARD F. KRONZ,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

GARY W. SHORT
Suite 2317, Koppers Building
Grant Street & Seventh Avenue
Pittsburgh, PA 15219
(412) 765-0100

TIMOTHY B. DYK
(Counsel of Record)
STEPHEN J. GOODMAN
PATRICK J. POTTER
DARRYL R. MARSCH
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939
PETER M. LIEB
JONES, DAY, REAVIS & POGUE
599 Lexington Avenue
New York, New York 10022
(212) 326-3939

Counsel for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-571

ROBERT J. TAYLOR, Trustee,

Petitioner,

v.

FREELAND & KRONZ, a Partnership;
WENDELL G. FREELAND; and
RICHARD F. KRONZ,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

REPLY BRIEF FOR PETITIONER

ARGUMENT

I. CONTRARY TO THE ARGUMENTS OF RESPONDENTS AND AMICI, SECTION 522(*l*) MUST BE CONSTRUED IN LIGHT OF SECTION 105(a)

Both respondents and amici have argued that the language of Section 522(*l*), in conjunction with Bankruptcy Rules 4003(b) and 9006(b)(3), is "clear" and "unambiguous" in providing that unless either the trustee or the creditors file an objection to a claimed exemption within the prescribed thirty-day period, the claimed exemption must be allowed. Resp. Br. 17-21, 24-26; Am. Br. 5-19.[1] However, as Taylor pointed out in his first brief on the merits, Section 522(*l*) must be construed in accordance with Section 105(a), which specifies that "[n]o provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate . . . to prevent an abuse of process." Therefore, as a number of lower courts have held, bankruptcy courts have the power to disallow frivolous exemption claims even when no one has objected to such claims within the period prescribed by Bankruptcy Rule 4003(b). Pet. Br. 27. Recognizing the effect of Section 105(a), respondents and amici have attempted to show that it is not applicable to this case, but their arguments lack merit.

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[1]As respondents concede, the legislative history of Section 522(*l*) is "limited" and merely "paraphrase[s]" the language of the statute. Resp. Br. 22-23.

1. Respondents first argue that this Court "could decline to consider petitioner's '§ 105(a) argument' as it was not raised below and was not raised in the Petition for Certiorari." Resp. Br. 32-33. However, by referring to Section 105(a) in his brief on the merits, Taylor was not making a new "argument," but simply citing additional legal support for an argument which both the bankruptcy court and district court relied upon below: that, even though Taylor did not formally object to the claimed exemption within the thirty-day period prescribed by Bankruptcy Rule 4003(b), Section 522(*l*) did not require the bankruptcy court to allow the exemption when there was no colorable statutory basis for it. Pet. App. 24a, 38a. There is no reason for this Court to disregard a relevant statutory provision that bears on the construction of Section 522(*l*) simply because it was not argued in the lower courts.[2]

2. Respondents have also argued that the 1986 amendment to Section 105(a), which added what is currently the second sentence of that provision, "was too late to apply" to Davis' exemption claim. Resp. Br. 33-35. However, that argument fails on two grounds. First, the amendment to Section 105(a) was merely a clarification of what the provision had always meant since its enactment in 1978. *See In re Bayou Self, Inc.*, 73 Bankr. 682, 683 (Bankr. W.D. La. 1987) ("The amendment to Section 105 was a clarification or

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[2]Even if Taylor's citation of Section 105(a) were considered to be a new "argument," Section 105(a) is "essential . . . to an intelligent resolution" of what Congress intended Section 522(*l*) to mean, and should therefore be considered by this Court. *Vance v. Terrazas*, 444 U.S. 252, 285 n.5 (1980).

codification of prior law, not a change in that law"); *In re Pretzer*, 96 Bankr. 790, 793 (Bankr. N.D. Ohio), *affirmed*, 1989 U.S. Dist. LEXIS 15146 (N.D. Ohio 1989) (noting that the amendment "clarified the Court's 'sua sponte' powers").[3] Second, even if the amendment were deemed to have altered the meaning of Section 105(a), the amending statute (the Bankruptcy Act of 1986) clearly provides that the amendment will take effect no later than 270 days after the effective date of the Act (November 26, 1986) and will apply to cases still pending at that time. Pet. Br. 25.[4] Thus, even if applying the amendment to this case would somehow amount to "retroactive" application of the amendment, as

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[3]Despite respondents' complaint that the bankruptcy court in this case did not act "sua sponte" (Resp. Br. 34-35), it is clear that when bankruptcy courts have the power to act "sua sponte" under Section 105(a), "they certainly can act, as here, upon the motion of a party." *Gibbons v. Haddad (In re Haddad)*, 68 Bankr. 944, 948 (Bankr. D. Mass. 1987).

[4]*See also United States Trustee v. Prines (In re Prines)*, 867 F.2d 478, 482 (8th Cir. 1989) ("Subsection [302](d)(1) [of the 1986 Act] provides that the Act's trustee provisions [including Section 105(a)] do not become effective or apply to pending cases . . . until two hundred seventy days after the Act's general effective date or thirty days after the Attorney General certifies the district, whichever comes first"). Moreover, while Subsection 302(d)(1) of the 1986 Act provides that certain amendments (including the amendment to Section 105) will apply to pending cases, Subsection 302(c)(1) of the same Act provides that a number of *other* amendments made by the Act "shall not apply with respect to cases commenced under Title 11 of the United States Code before the effective date of the Act." Thus, Congress made a clear distinction between those amendments which were only prospective in effect and those (including the amendment to Section 105(a)) which were also to be applied retroactively.

respondents claim, Congress has clearly prescribed that the amendment be applied in that manner and this Court should give effect to Congress' intentions. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990) ("where the congressional intent is clear, it governs").

3. In addition to arguing that this Court should simply ignore Section 105(a), respondents (and amici) argue that it is not an "abuse of process," within the meaning of Section 105(a), to make exemption claims for which there is no colorable statutory basis. Resp. Br. 36-37, Am. Br. 35-36. Amici argue, in particular, that "abuse of process" always "require[s] some element of malice." Am. Br. 36. But both respondents and amici are conspicuously silent about the fact that this Court, in *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2456 (1990), recognized that the filing of papers which violate the (objective reasonableness) standard of Fed. R. Civ. P. 11 is an "abus[e of] the judicial process." Pet. Br. 26. Nor have they acknowledged the fact that, as Taylor pointed out in his initial brief on the merits, a number of lower federal courts have held that Section 105(a) permits bankruptcy courts to disallow frivolous exemption claims even in the absence of a timely objection. Pet. Br. 27. There is simply no reason to assume that Congress used the term "abuse of process" in the narrow fashion urged by the respondents and amici.

4. Amici also mischaracterize Taylor's position by contending that he views Section 105(a) as a broad authorization "to do equity in derogation of other provisions of the Code and Rules." Am. Br. 33. However, Taylor has never made any such claim.

Section 105(a) merely makes clear that with respect to *some* provisions of the Code (those which "provid[e] for the raising of an issue by a party in interest"), the bankruptcy court has the power to act, even if the parties in interest have not raised the issue in a timely fashion, when (and *only* when) such action by the court is "necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." The cases cited by amici are not apposite,[5] and they fail to acknowledge the truly apposite cases, cited by Taylor, in which courts used Section 105(a) to disallow frivolous exemption claims. Pet. Br. 27.[6]

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[5]The only case cited by amici which deals with the bankruptcy court's power to act under Section 105, when parties have not raised issues in a timely fashion, is *Zidell, Inc. v. Forsch (In re Coastal Alaska Lines, Inc.)*, 920 F.2d 1428 (9th Cir. 1990), and that case is not on point. In *In re Coastal Alaska Lines*, the Ninth Circuit held that Section 105(a) does not authorize bankruptcy courts to enlarge the time for filing a proof of claim under Bankruptcy rule 3002(c). But the creditor whose late claim was disallowed apparently did not assert, nor did the Ninth Circuit find, that allowance of his claim was necessary in order "to enforce or implement court orders or rules" or to prevent any party to the proceeding from successfully committing an "abuse of process." 920 F.2d at 1431-33.

[6]Respondents also make the surprising argument that "[i]f Congress wanted to modify the objection procedure to remedy an alleged evil they saw in it, they would have undoubtedly amended § 522(*l*) of the Code when they amended § 105(a)." Resp. Br. 37. But clearly there was no need to amend *both* statutes. It was obviously more economical for Congress to pass a clarifying amendment to Section 105(a), which refers not only to Section 522(*l*), but also to other provisions of the Code which "provid[e] for the raising of an issue by a party in interest . . . ."

5. Finally, respondents and amici have argued that even if Section 522(*l*), as construed in light of Section 105(a), does not permit bankruptcy courts to disallow frivolous exemption claims when no objection has been made within the period required by Bankruptcy Rule 4003(b), there are other available sanctions which will discourage debtors from making frivolous exemption claims. Resp. Br. 27-31, Am. Br. 42-45. But even if that argument were correct, it would not be any reason to ignore the effect of Section 105(a). And, in fact, that argument is *not* correct. Bankruptcy Rule 9011(a) is not an available sanction in cases of this sort.[7] The other sanctions identified by respondents and amici would at most be available to punish deliberate misrepresentations, and would not be applicable in cases where

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[7]It is clear that under Rule 9011(a), "schedules . . . are excepted from the papers that must be signed by the debtor's attorney" and that "[t]hus, sanctions may not lie against an attorney for transgressions surrounding these documents." *In re Alderson*, 114 Bankr. 672, 677 (Bankr. D. S.D. 1990). *See also In re Muscatell*, 116 Bankr. 295, 298 (Bankr. M.D. Fla. 1990) (even if attorney had improperly advised debtor not to disclose certain properties on the schedule of assets, the attorney could not be sanctioned for such conduct under Rule 9011(a) because he did not sign the schedules). It is incongruous to assert, as respondents and amici do, that a debtor, like Davis, who was represented by counsel, could be sanctioned under Rule 9011(a) for making a legally improper claim when her attorney would not be subject to such sanctions. While represented parties are subject to the requirements of Fed. R. Civ. P. 11, *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 111 S.Ct. 922, 929-931 (1991), Fed. R. Civ. P. 11 (unlike Bankruptcy Rule 9011) requires attorneys for represented parties to sign *all* papers, and thus subjects the attorney to sanctions for any legally groundless pleading. It is one thing to make both the attorney and his client liable for filing a legally groundless document, and quite another to make only the client liable.

frivolous exemption claims were merely the result of carelessness.[8] Consequently, they would not require debtors (or their counsel) to make a reasonable inquiry into the validity of exemptions before claiming them, and would leave many "abuses of process" (in the form of unreasonable claims) unredressed.

II. THE VARIOUS POLICY ARGUMENTS MADE BY RESPONDENTS AND AMICI ARE WITHOUT MERIT

Both respondents and amici have argued that, as a matter of "policy," adopting Taylor's interpretation of Section 522(*l*) would have various adverse effects upon the operation of the bankruptcy system. Resp. Br. 23-24, 29, 31-32; Am. Br. 28-29, 46-54. However, the arguments made by respondents and amici are without merit.

1. Respondents and amici argue that one purpose of the Code is to provide the debtor with a "fresh start" and that this goal would be frustrated unless debtors can be sure, once no one has objected to a claimed exemption within the period prescribed by

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[8]As respondents and amici point out, both 11 U.S.C. § 727(a)(4)(B) (1988), which permits bankruptcy courts to deny the debtor a discharge under certain circumstances and 18 U.S.C. § 152 (1988), which defines bankruptcy crimes, apply only to "knowing[] and fraudulent[]" misconduct. Resp. Br. 31; Am. Br. 44-45. Similarly, one is only guilty of "perjury" under 18 U.S.C. § 1621 if he or she "willfully subscribes as true any material matter which he does not believe to be true." 18 U.S.C. § 1621(2) (1988). And the various professional codes cited by amici (Am. Br. 43 n.13) prohibit only "knowing" misconduct.

Bankruptcy Rule 4003(b), that the exemption will be allowed. Resp. Br. 23-24, 39; Am. Br. 46-51. But under the interpretation of Section 522(*l*) urged by Taylor, debtors would be deprived of that security only if they had made a frivolous exemption claim. Pet. Br. 23-24. Even if the bankruptcy court believed that the debtor was not entitled to the exemption, it could not disallow the exemption if the propriety of the exemption were reasonably disputable. *Id.* Surely the objective of a "fresh start" is not harmed by requiring the debtor to have *some* reasonable basis for the exemptions that he or she claims. Nor is there any reason to believe that Congress intended debtors to have a "fresh start" at all costs and without any regard at all to the propriety of their own conduct in the bankruptcy court.[9]

2. Respondents and amici also argue that if this Court adopts Taylor's position, trustees will be able to exploit unwary debtors by deliberately failing to object to groundless exemption claims, letting the debtor incur all of the expenses that the trustee should have borne (e.g., the expense of prosecuting a pending lawsuit), and then objecting to the claimed exemption only after the debtor's work has produced a valuable result (such as the settlement in this case). Am. Br. 28-29; Resp. Br. 31-32.[10] However, in such a case, those whose work preserved (or actually enhanced) the estate would be

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[9]The same considerations apply to amici's contention that Taylor's interpretation of Section 522(*l*) would hinder "the just, speedy and inexpensive determination of every case and proceeding." Am. Br. 51-53.

[10]Amici do concede, however, that there is no evidence of any such motive on Taylor's part. Am. Br. 31 n.8.

entitled to assert an administrative priority claim, against the estate, under 11 U.S.C. § 503(b).[11] *See, e.g., Burlington Northern R. R. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700, 709 (9th Cir. 1988) ("When a claimant expends funds [post-petition] that preserve the estate, treatment as an administrative expense is authorized by the Bankruptcy Code"); *Lancaster v. Tennessee (In re Wall Tube & Metal Products Co. v. Lancaster)*, 831 F.2d 118, 124 (6th Cir. 1987) (state entitled to administrative expense priority for its response costs from the debtor's estate under CERCLA). Accordingly, the trustee would have nothing to gain (and much to lose[12]) by withholding a valid objection to the claimed exemption.

3. Finally, amici argue that if this Court were to adopt Taylor's position, the result would "have profound negative impact on the administration of

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[11]Section 503(b) provides, in pertinent part, that:

> After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including --
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case . . . .

11 U.S.C. § 503(b) (1988).

[12]The court might find, contrary to the trustee's belief, that the claimed exemption was incorrect but not wholly frivolous. In that case, the trustee would simply have forfeited a meritorious objection to the claimed exemption.

reorganization cases." Am. Br. 53-54. Specifically, amici contend that under Chapters 11 and 13 of the Code, a plan may not be confirmed unless creditors are receiving at least what they would receive if the estate were liquidated (the so-called "best interest of creditors" test). Am. Br. 53. Thus, amici appear to be arguing, plans could not be confirmed if there was a possibility that exemptions might later be disallowed (thus increasing the size of the estate and the amount to which creditors would be entitled in the event of a liquidation). But the Code does not prevent bankruptcy courts from confirming a plan simply because something may happen, after confirmation of the plan, that will increase the size of the estate. Indeed, Congress has specifically provided, under both Chapter 11 and Chapter 13 of the Code, that plans may be modified after they are confirmed.[13]

III. DAVIS HAD NO COLORABLE STATUTORY BASIS FOR CLAIMING THE ENTIRE PROCEEDS OF THE TWA LAWSUIT AS EXEMPT

In his initial brief on the merits, Taylor pointed out that when Davis filed her bankruptcy petition, she could not reasonably have believed that the entire proceeds of the TWA lawsuit were exempt under Section 522(d).

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[13] 11 U.S.C. § 1127(b) (1988) allows modification of a Chapter 11 plan "at any time after confirmation . . . and before substantial consummation of such plan . . . ." And 11 U.S.C. § 1329 (1988) allows modification of a Chapter 13 plan at "any time after confirmation of the plan but before the completion of payments under such plan . . . ." "[T]he application of the liquidation value test must [simply] be redetermined at the time of the confirmation of the modified plan." H.R. Rep. No. 595, 95th Cong., 1st Sess. 431 (1977).

She knew that a large portion (if not all) of any recovery would be for "back pay" and/or "tort claims," both of which are clearly *not* exempt under Section 522(d). Respondents do not contend otherwise.

1. At the time that Davis filed her bankruptcy petition, the Pittsburgh Human Relations Commission ("the Commission") had awarded her an unspecified amount of damages for "back pay." Pet. Br. 30-31. Respondents do not dispute that the only exemption available, under Section 522(d), for this "back pay" award would be a "catch-all" exemption, under Section 522(d)(5), in the amount of $3,950. Thus, even if one were to accept respondents' contention that the value of the TWA lawsuit was only $5,000 or $10,000 at the time that Davis filed her bankruptcy petition (Resp. Br. 46-47), Davis would not have been entitled to exempt the entire amount.

2. In fact, as the bankruptcy court found, the value of the TWA lawsuit on October 24, 1984 (the date on which Davis filed her bankruptcy petition) was $110,000. Pet. App. 40a.[14] Respondents now argue at length that when either Davis or her bankruptcy attorney stated, at the creditors' meeting held on January 4, 1985, that there was a "possible claim [of] $90,000" in the TWA lawsuit, they were not actually *valuing* the suit at $90,000. Resp. Br. 41-42. But respondents fail to discuss the fact that, only five days later, on January 9, 1985, John A. Meyer, an associate of Freeland and Kronz who was representing Davis in the TWA lawsuit,

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[14]Neither the district court nor the court of appeals addressed the valuation issue. Pet. App. 15a, 25a.

wrote a letter to Taylor in which he valued the case at "approximately $110,000."[15] Of that $110,000, it is clear that Davis and her attorneys viewed at least $70,000 as being for "back pay."[16] Davis could not reasonably have believed, when she filed her petition, that the entire amount would be exempt under Section 522(d).

3. Even if one were to assume that when Davis filed her bankruptcy petition, she envisioned the settlement which ultimately was reached in 1987, she would have had no colorable grounds under Section 522(d) for exempting the $23,483.75 that was characterized in the settlement agreement as being for "tort claims."[17] In short, under any view of the matter,

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[15]Specifically, Meyer advised Taylor that "there is no way of ascertaining *the value of the case to Ms. Winn [Davis]* other than by calculating the back pay together with prejudgment interest, since the date of her layoff" and that "[w]e have calculated the back pay and interest at approximately $110,000.00." Jt. App. 28 (emphasis added).

[16]As discussed in Taylor's initial brief on the merits, the estimate of damages which respondents submitted to TWA in 1987 calculated Davis' back pay for the period 1977-1980 at approximately $11,000 (without interest) and additional back pay for the period 1981-1984 at approximately $62,000 (without interest). Pet. Br. 31 n.15, 32 n.18; Jt. App. 31.

[17]The settlement agreement provided that Davis was to receive $23,483.75 "as and for back pay or front pay" and $23,483.75 "as and for all alleged tort claims or any other claims not represented [sic] asserted wage losses." Jt. App. 42. In addition, respondents were to receive $63,032.50 "as and for attorneys' fees and expenses. . . ." *Id.* As respondents point out in their brief, the $23,483.75 paid "as and for back pay or front pay" was paid directly to Davis (rather than to Freeland & Kronz), and Taylor is not seeking to recover that amount

(continued on next page...)

it is clear that Davis had no colorable basis for claiming the entire proceeds of the TWA lawsuit as exempt, and that the bankruptcy court acted properly in disallowing her exemption claim as to the $23,483.75 which she received in settlement of her "tort claims."

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[17](...continued from previous page)
from respondents. Resp. Br. 47 n.36. Nor is Taylor seeking to recover the amount paid for attorneys' fees. Taylor is simply seeking to recover what the bankruptcy court awarded him: the $23,483.75 paid for "tort claims," plus interest. Pet. App. 41a. Because Taylor now expects to recover approximately $11,000 from Davis as a result of a bank attachment (Resp. Br. 39 n.23), respondents may be liable for a balance of only approximately $12,000.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

GARY W. SHORT
Suite 2317
Koppers Building
Grant Street & Seventh Avenue
Pittsburgh, PA 15219
(412) 765-0100

TIMOTHY B. DYK
(Counsel of Record)
STEPHEN J. GOODMAN
PATRICK J. POTTER
DARRYL R. MARSCH
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

PETER M. LIEB
JONES, DAY, REAVIS & POGUE
599 Lexington Avenue
New York, NY 10022
(212) 326-3939

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FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT J. TAYLOR, TRUSTEE,
PETITIONER,
v.
FREELAND & KRONZ, A PARTNERSHIP;
WENDELL G. FREELAND; AND
RICHARD F. KRONZ,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief of the Mon Valley Unemployed Committee, Lenie Tate, Robin Showalter, and Gloria and Thomas Peebles as Amici Curiae in Support of Respondents

GARY KLEIN, ESQUIRE
Counsel of Record
NATIONAL CONSUMER LAW CENTER
11 Beacon Street
Boston, Massachusetts 02174
(617) 523-8010

DANIEL L. HALLER, ESQUIRE
NEIGHBORHOOD LEGAL SERVICES ASSOCIATION
928 Penn Avenue
Pittsburgh, Pennsylvania 15222
(412) 644-7431

JANET E. BOSTWICK, ESQUIRE
GOLDSTEIN AND MANELLO
265 Franklin Street
Boston, Massachusetts 02110
(617) 439-8900
Attorneys for Amici Curiae

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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STATEMENT OF INTEREST OF AMICI

Amicus, the Mon Valley Unemployed Committee (MVUC) is an organization comprised of over 7,000 unemployed and underemployed workers throughout Western Pennsylvania. For the last decade, MVUC has been at the forefront in the effort to assist workers, primarily from the dying or retrenching smokestack industries, in dealing with the economic and social effects of the difficult economic times encountered by those industries in Western Pennsylvania. MVUC has counseled and otherwise assisted many workers who have sought to save their homes from mortgage foreclosure. In some cases MVUC urges that workers seek legal counsel to see whether a Chapter 13 or Chapter 7

bankruptcy might be appropriate to save their home or at least their exempt equity in it.

Lenie Tate is a resident of Massachusetts. She has filed bankruptcy under Chapter 13 of the Code and has declared exemptions in various property including a bank account and a pension.

Robin Showalter is a resident of Pennsylvania who has also filed bankruptcy under Chapter 13 of the Code in order to save her home from foreclosure sale. She has declared exemptions in various property including a small equity in the real estate.

Gloria and Thomas Peebles are residents of Pennsylvania. They have filed bankruptcy under Chapter 7 of the Code and have declared exemptions in

various property including a claim for compensation due to an injury.

SUMMARY OF ARGUMENT

The plain language of the Code and Bankruptcy Rules sets out a scheme for allowing exemptions which is clear and unambiguous. Property included on the debtor's list of exempt property is exempt unless a party in interest timely objects. The procedural rules setting time limits for objections are based on nearly identical rules of civil, criminal and appellate procedure which have been upheld against all challenges.

The Bankruptcy Code contemplates that the debtor's list of exempt property will put the trustee on notice of the debtor's claimed exemptions. The trustee here concedes that he had notice

of the relevant claimed exemption at the time of the meeting of creditors. Nevertheless he failed to file a timely objection. In fact, the trustee took no action to challenge the claimed exemption for more than three years, until after the debtor and her attorneys had expended their own time and money to liquidate the claim.

The debtor adequately listed and described a cause of action as exempt property in her bankruptcy case. She committed no abuse of process. Neither the trustee nor the bankruptcy court has the necessary equitable power to remedy the failure of the trustee and all other parties to make a timely objection.

The thoughtful and well-reasoned decision of the Court of Appeals in this matter should be affirmed.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE AND RULES MANDATES THAT PROPERTY CLAIMED AS EXEMPT IS EXEMPT UNLESS A TIMELY OBJECTION IS RAISED.

A. This Court's Inquiry Need Go No Further Than An Examination of the Text of 11 U.S.C. §522(l) and Bankruptcy Rules 4003(b) and 9006(b)(3).

The issue in this case is whether a court is permitted to disallow a debtor's exemption outside the time scheme set out in the Bankruptcy Code and Rules.[1]

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[1]Although this proceeding is ostensibly a turnover action by the trustee pursuant to 11 U.S.C. §542, all parties apparently agree that turnover must be denied unless a late objection to the debtor's exemption of the asset sought can be allowed. See generally In

Footnote continued on next page

As in all cases of statutory construction, the starting point in this case must be the statutory language. Toibb v. Radloff, 501 U.S. - , 111 S. Ct. 2197, 115 L.Ed.2d 145 (1991); Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. -, 110 S. Ct. 2126, 2130, 109 L.Ed.2d 588 (1990); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 109 S. Ct. 1026, 1030, 103 L.Ed.2d 290 (1989). "The plain meaning of legislation should be conclusive, except in the rare cases [in which] the

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[1]Footnote continued from previous page

re Grossman, 80 B.R. 311 (Bankr. E.D. Pa. 1987)(request for turnover of property claimed as exempt requires determination of whether an objection to the exemption can be allowed).

literal application of a statute will produce a result demonstrably at odds with the intention of the drafters." Ron Pair, 109 S. Ct. at 1031 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S. Ct. 3245, 73 L.Ed.2d 973 (1982)). "The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." Union Bank v. Wolas, ___ U.S. ___, 112 S. Ct. 527, 528 (1991).

This is especially true in the bankruptcy context. Congress worked on the formulation of the Bankruptcy Code for nearly a decade. The Code was established to modernize the bankruptcy laws and as a result made major changes

in the substantive laws of bankruptcy. Ron Pair, 109 S. Ct. at 1030. This legislative history bolsters the need to interpret the Bankruptcy Code by its plain language, manifesting Congressional intent. As this Court stated in Ron Pair:

> In such a substantial overhaul of the system, it is not appropriate or realistic to expect Congress to have explained each step it took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain meaning of the statute.

109 S. Ct. at 1030.

This court has stated a similar dictate requiring adherence to the plain language of properly promulgated court rules. Courts have no authority to tamper with the plain language of Rules

of Court, including limitations periods. Schiavone v. Fortune, 477 U.S. 21, 106 S. Ct. 2379, 91 L.Ed.2d 18 (1986).

In this case, the language of the Code and Rules establish a time frame for objections to exemptions which is absolutely clear. Section 522(1) provides in relevant part:

> The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. ... Unless a party in interest objects, the property claimed as exempt on such list is exempt.

11 U.S.C. §522(1).

The relevant time limitation for objections is then set out in Bankruptcy Rules 4003(b) and 9006(b)(3):

> 4003(b) Objections to Claim of Exemptions. The trustee or any creditor may file

> objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a), or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court. * * *
>
> 9006(b)(3) Enlargement Limited. The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.

Fed. R. Bankr. P. 4003(b), 9006(b)(3).

Read together, these provisions create a scheme for determining objections to claimed exemptions which is coherent, uncomplicated and clear. In order to dispute a claimed exemption, a trustee or creditor must object within

30 days after the meeting of creditors or seek more time for objection within that period. Failure to pursue the objection or to seek more time within the statutory period means that the property listed as exempt is exempt.[2]

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[2]This scheme represents a substantial change from prior practice under the Bankruptcy Act. The Act required that the trustee affirmatively set apart the debtor's exemptions. 11 U.S.C. §§6, 47a(6) [repealed]. This requirement was effectuated by former Rule 403(b) which required the trustee to make a report on the debtor's exemptions. The burden was then on the debtor or a creditor to object to the trustee's report within 15 days or to request more time during that period. Bankr. Rule 403(c) [abrogated]. Former Rule 906(b) prevented a court from extending the debtor's time to the trustee's report beyond the 15 day time limit.

This Court has held that when the

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As stated by the 10th Circuit in In re Brayshaw, 912 F.2d 1255, 1257 (10th

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[2]Footnote continued from previous page

plain language of a statute is inconclusive, Congressional intent to overrule prior law will not be inferred without some support in the legislative history. Dewsnup v. Timm, ___ U.S.___, 112 S. Ct. 773 (1992); Kelly v. Robinson, 479 U.S. 36, 107 S. Ct. 353, 93 L.Ed.2d 216 (1986). Because the plain language here is conclusive, the Court need not resort to this principle. However, it is clear in the legislative history that Congress was aware that it was changing prior practice. H.R. Rep. No. 595, 95th Cong., 1st Sess. 363 (1977); Sen Rep. No. 95-989, 95th Cong. 2d Sess. 77 (1978) ("Absent an objection to the list [of exemptions], the property is exempted.")

Moreover, the change in prior practice did not effect an alteration of the Rule requiring objections to exemptions to be made within a strict time frame. See, e.g., In re Levens,

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Cir. 1990),

> There simply is no room in the wording for construing Rule 4003(b) or Rule 9006(b) to permit granting an extension of time to file objections outside the original thirty-day time limit.

See also, e.g., 8 Collier on Bankruptcy ¶4003.04[3] at pp. 4003-13 (15th ed. 1991).

The linchpin of the scheme for determining whether late objections are allowable is Rule 9006(b)(3) because it

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[2]Footnote continued from previous page

563 F.2d 1223 (5th Cir. 1977) (describing prior practice); In re Santoro, 3 B.R. 210 (Bankr. E.D. N.Y. 1980) (enforcing former Rule 906(b) against the debtor's late objection to the trustee's report). The only change was to place the burden on the trustee to object to the debtor's exemptions rather than the other way around.

sets forth the conditions under which a court may properly extend the time for objections to a claimed exemption.

Rule 9006(b) is patterned after Fed. R. Civ. P. 6(b) and Fed. R. App. P. 26(b). Fed. R. Bankr. P. 9006, Advisory Committee Note. See In re Hill, 811 F.2d 484, 487 (9th Cir. 1987). Another analogous Rule is Fed R. Crim. P. 45(b). All four rules limit the authority of courts to enlarge time periods for certain actions.

This Court has been called upon on several prior occasions to uphold and enforce the provisions of such rules. They have been enforced in situations where the consequences of denying relief to untimely parties were harsher than in the proceeding here. In United States

v. Robinson, 361 U.S. 220, 80 S. Ct. 282, 4 L.Ed.2d 259 (1960), for example, indigent criminal defendants were denied their right of appeal based on their failure to timely file a notice and the plain language of Rule 45(b). Similarly, in Torres v. Oakland Scavenger Co., 487 U.S. 312, 108 S. Ct. 2405, 101 L.Ed.2d 285 (1988), the plain language of Rule 26(b) was applied to cut off an appeal by a party not named in a notice of appeal.[3]

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[3]In Torres, Justice Scalia stated the following principles in his concurring opinion:

> By definition all rules of procedure are technicalities; sanctions for failure to comply with them always

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The prototype for both Bankruptcy Rule 9006(b) and Fed. R. Crim. P. 45(b) is Fed R. Civ. P. 6(b). See Fed. R. Bankr. P. 9006 Advisory Committee Notes, Fed. R. Crim. P. 45(b) Advisory Committee Notes. With respect to

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[3]Footnote continued from previous page

> prevents the court from deciding where justice lies in the particular case, on the theory that securing a fair and orderly process enables more justice to be done in the totality of cases. It seems to me moreover, that we should seek to interpret the rules neither liberally or stingily, but only, as best we can, according to their apparent intent. Where the intent is to provide leeway, a permissive construction is the right one; where it is to be strict, a permissive construction is wrong.

Torres, supra, 487 U.S. at 319. These principles apply equally to the Bankruptcy Rules.

Criminal Rule 45(b) this court has stated:

> It has consistently been held that Civil Rule 6(b) was mandatory and jurisdictional and could not be extended regardless of excuse. It must be presumed that the Advisory Committee and the Justices of this Court were aware of the limiting language of Civil Rule 6(b) and of the judicial construction it had received when they prepared and adopted the Federal Rules of Criminal Procedure.

United States v. Robinson, supra, 361 U.S. at 228 (citations omitted). This conclusion applies with equal force to Bankruptcy Rule 9006(b) because it is also based on Fed. R. Civ. P. 6(b).

A decision allowing the trustee's late objection here, in derogation of the plain language of Rule 9006(b), would call into question the interpretation of the several federal

rules on enlargement of time. In addition, such a decision would permit reexamination of decisions on the enforceability of all the various time limitations referenced in Rule 9006(b)(3). This would throw numerous questions of finality in a bankruptcy proceeding into doubt. See, e.g., In re Coastal Alaska Lines, Inc., 920 F.2d 1428 (9th Cir. 1990) (applying Rule 9006(b) to Rule 3002(c) on time limits for filing proof of claim); In re Hill, 811 F.2d 484 (9th Cir. 1987) (applying Rule 9006(b)(3) to Rule 4007(c) on time for filing complaint to determine dischargeability); Neeley v. Murchison, 815 F.2d 345 (5th Cir. 1987) (same). See also In re Ichinose, 946 F.2d 1169 (5th Cir. 1991) (Rule 9006(b)(3) precludes

application of excusable neglect standard to Rule 4007(c)).

B. By describing the property in her schedules and placing it on the list of property declared exempt, the debtor gave sufficient notice of the exemption for the trustee to form a timely objection.

In the formulation of Section 522(l), Congress was quite explicit in stating that absent objections, property on the debtor's list of exemptions is exempt. Section 522(l) contemplates that the act of placing an item of property on the list initiates the process by which trustees and creditors may object and thereby obtain a court determination.

The process contemplated by the statutory scheme is one of notice. The list of exemptions puts the trustee on

notice of the debtor's claim. It starts the process under which a timely objection must be filed. Obviously, a careful trustee must review each and every claim of exemption on the debtor's list.

Here, it is undisputed that the debtor placed the item of property at issue on her list of exemptions at the outset of the case. Jt. Appendix, p. 18. The nature of the property was fully described. There is no suggestion that the debtor here was attempting to conceal property by misdescribing it or leaving it out of her schedules entirely.

It is also clear that there is a good faith basis for an exemption

of the property here under the federal exemption scheme elected by the debtor.[4] Sections 522(d)(11)(D) and (E) allow a debtor to exempt elements of damages for many causes of action.[5] 11 U.S.C. §522(d)(11)(D),(E). Additionally, under Section 522(d)(5) a debtor

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[4]Debtors in Pennsylvania have the option of choosing either federal or state exemptions under Section 522(b). 11 U.S.C. §522(b). The debtor here has chosen the federal exemptions. See Jt. Appendix, pp. 17-18.

[5]Even if the trustee is correct in arguing that these exemptions do not cover the damages which the debtor ultimately recovered in her case against TWA, that does not mean that the claims of exemptions could not have been made four years earlier in good faith. See section I.C. of this brief, infra.

has a "wild card" exemption which applies to property of any description. 11 U.S.C. §522(d)(5). When a debtor does not claim a homestead, as here, that exemption is $4,150.

Placing the property on the list shifts the burden to the trustee and creditors to raise an objection if one is available. That point is underscored in this case, because the trustee's proceeding memo of the Section 341 Meeting of Creditors makes clear that the trustee had actual notice

of the asset in question.[6] Jt. Appendix, p. 26. Thus, at the time the creditors' meeting was held, the trustee had the requisite written notice under Section 522(1), he had actual notice and he had 30 days on which to raise an objection under Rule 4003(b). He simply failed to do so.

This would be a different case if the debtor had misdescribed, misrepresented or concealed the asset so as to deprive the trustee

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[6]It is clear that the trustee must have investigated the asset at the Section 341 meeting or otherwise because his notation in the Proceeding Memo "On Appeal to PA Supreme Court" (Jt. Appendix p. 26) provides information which was not available to him in the debtor's schedules.

of an opportunity to object. See, e.g., Payne v. Wood, 775 F.2d 202, 205 (7th Cir. 1985), cert. denied, 475 U.S. 1085, 106 S. Ct. 1466, 89 L.Ed.2d 722 (1986). However, in this case, the grounds asserted by the trustee in his late objection, i.e., that there is no statutory basis for the exemption and that the claim is insufficiently specific, were equally available for a timely objection.

C. The scheme created by the Code and Rules for determining when objections to exemptions may be allowed is reinforced by the provisions of Section 522(a)(2) and by the procedures the Code contemplates for the administration of property of the estate.

Vindication of the trustee's position in this case would also require the Court to ignore the plain language of Section 522(a)(2) of the Code and the procedures the Code contemplates for administration of property of the estate.

Section 522(a)(2) provides with respect to exemption claims:

> "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

11 U.S.C. §522(a)(2). Section 522(a)(2), like Section 522(1), prevents a trustee from taking a "wait and see" attitude with respect to the exemptions claimed by the debtor. The trustee cannot simply wait several months or years for the debtor to convert various

property to cash and then claim the excess over the exemption.

The value of the property is determined as of the date on which bankruptcy is filed. When the trustee does not administer the property, appreciation of the property based on market forces or the debtor's postpetition improvements must accrue to the benefit of the debtor. With respect to a chose in action like the one exempted by the debtor here, the value of the claim as of the date of filing necessarily reflects its contingent and unliquidated nature. See Crossley v. Lieberman, 90 B.R. 682, 698 (E.D. Pa. 1988) aff'd. on other gds., 868 F.2d 566 (3rd Cir. 1989).

It is up to the trustee to evaluate the chose in action in a timely fashion and, if it has value to the estate, to administer it for the benefit of creditors. If the trustee believes that the value of the claim exceeds the debtor's exempted interest, an objection to the exemption must be timely filed. Once an exemption is allowed by operation of law pursuant to Section 522(l), the debtor is entitled to rely on that occurrence and to treat the exempt interest as if it had not been divested. See, e.g., Wissman v. Pittsburgh National Bank, 942 F.2d 867 (4th Cir. 1991) (once property is exempted debtor may pursue recovery of exempt interest).

If the exemption is either not claimed or disallowed, the property is not exempt and the trustee has the right to administer the property for the benefit of creditors and ultimately to liquidate it to pay claims against the estate. See 11 U.S.C. §§541, 704. However, the trustee must bear the costs of that administration, including any legal fees incurred. 11 U.S.C. §§704(1) and 327(a). See Ohio v. Kovacs, 469 U.S. 274, 284 n.12, 105 S. Ct. 705, 83 L.Ed.2d 649 (1985) (trustee is "charged with the duty of collecting ... non-exempt property and administering it"). It flies in the face of the scheme set out by

the Code to allow a trustee to lie in wait for months or years after property has been claimed as exempt (while, for example, the debtor pays attorneys and otherwise expends monies to liquidate the property), and then to allow the trustee to seize the proceeds because the value of the property has increased during the intervening time.[7]

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[7]A similar situation arises when a debtor claims a homestead exemption covering all of his equity in his home. If the trustee fails to object, that debtor is entitled to rely on the failure to object to conclude that the home will not be liquidated by the trustee. He then might go ahead and undertake repairs. Because of Section

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The trustee's position requires him to make decisions about which assets have sufficient value so that the estate would benefit from their liquidation. Part of that process requires the trustee to evaluate the debtor's claim of an exempt interest in that property and to challenge it if it

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[7]Footnote continued from previous page

522(a)(2), inter alia, the trustee would not be entitled to the increase in value to the home resulting from the postpetition repairs.

Similarly, by failing to file an objection, the trustee here lulled the debtor and her attorneys into doing postpetition work which increased the value of the relevant property from a contingent and unliquidated asset of little value into full-blown proceeds of a legal claim.

can be disallowed. The scheme established by the Code and Rules require that the trustee make decisions about challenging the exemptions in a timely fashion.[8]

D. The Power Granted Under Section 105(a) Can Not Be Used to Override Time Limitations in the Code and Rules.

The trustee argues that Section 522(l) and the specific time limitations contained in the Rules are somehow

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[8]Although there is no reason for the Court to speculate about the trustee's motive in failing to object, there is a strong appearance here that the trustee simply doubted that the asset had significant value. Although he apparently followed the progress of the case from afar, he did nothing to intervene until the asset was liquidated.

overcome by the more general provisions of Section 105. That argument has no merit.

Section 105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. §105(a).

Petitioner's argument is based on the notion that a bankruptcy court has statutory power under Section 105 to do equity. Even assuming that allowing late objections would, in fact, be equitable, Section 105 does not grant

the necessary power to do equity in derogation of other provisions of the Code and Rules. In re Ionosphere Clubs, Inc., 922 F.2d 984, 995 (2d Cir. 1990) cert denied 112 S. Ct. 50 (1991).

As this court has noted, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code". Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 108 S. Ct. 963, 99 L.Ed.2d 169, 179 (1988).

There is no equitable power under Section 105 to ignore more specific provisions of the Bankruptcy Code. In re Ionosphere Clubs, Inc., supra; In re Sutton, 786 F.2d 1305 (5th Cir. 1986) ("the powers granted by [Section 105(a)]

may be exercised only in a manner consistent with the provisions of the Bankruptcy Code"). See also In re Continental Airlines, 907 F.2d 1500, 1509 (5th Cir. 1990) (Section 105(a) "does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity."). Similarly, Section 105(a) is not a grant of authority to rewrite specific time limitations contained in the Rules. In re Coastal Alaska Lines, Inc., 920 F.2d 1428 (9th Cir. 1990). See also Torres v. Oakland Scavenger Co., 487 U.S. 312, 108 S. Ct. 2405, 101 L.Ed.2d 285 (1988) (the court of appeals has no equitable authority to override specific time

limitations contained in the Appellate Rules).

There is little in the trustee's brief to indicate what limits he would apply to a judge's equitable powers under Section 105(a). The trustee appears to assume that the debtor's conduct here is clearly remediable under Section 105(a) as "abuse of process". The trustee would ignore the fact that abuse of process has long been given meaning in our legal system as a term of art. See 1 Am. Jur. 2d "Abuse of Process" §1.[9] See also, e.g., In re

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[9]Am. Jur. defines abuse of process as the "malicious misuse or misapplication of [legal] process to accomplish some purpose not warranted or commanded by the writ." 1 Am. Jur. 2d "Abuse of Process" §1.

Captran Creditors Trust, 116 B.R. 845, 853 (Bankr. M.D. Fla. 1990) (defining abuse of process).[10]

Traditional notions of abuse of process always require some element of malice. The debtor's conduct here at most arises to failure to carefully specify her exemption. Although she and her attorney might have been more careful, nothing that they did even arguably rises to the level of abuse of process.

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[10]The trustee's brief at 25-26 accurately describes the applicable legislative history as sparse. The history of the amendment cited does little to delineate the limits that Congress would place on the term abuse of process. Nor does it significantly support the trustee's position.

II. THE POLICY CONCERNS RAISED BY THE PETITIONER AND WHICH FORMED THE BASIS OF THE DECISIONS BY THE BANKRUPTCY AND DISTRICT COURTS ARE IRRELEVANT AND GROUNDLESS.

A. Because the Language of the Code and Rules is Plain, Policy Concerns Have No Place in the Resolution of the Issue Before the Court.

As discussed above, resolution of this matter is controlled by the plain language of the Code and Rules. Since the scheme for objecting to exemptions is clear, there is no need to turn to Congressional intent, much less to vague notions of policy.

The bankruptcy and district courts which ruled in this case chose to ignore the plain language of the Code and Rules. They did so based on vague notions of policy.

The bankruptcy court, for example, stated that requiring a trustee to object to all unwarranted claims of exemption "would encourage certain debtors of questionable integrity to claim all of their property as exempt, thereby leaving it to the trustee and creditors to challenge such claims." It concluded without citation to the legislative record, "... this surely would not be the congressional intent". In re Davis, 105 B.R. 288, 293 (Bankr. W.D. Pa. 1989) aff'd 118 B.R. 272 (W.D. Pa. 1990).

Not only does this reasoning overlook the ease with which a trustee could object to an unfounded claim of objection, but

also it flies in the face of any accepted notion of statutory interpretation. Since there is no ambiguity in the scheme created by the Code and Rules, there is no need to look to Congressional intent, let alone to speculate on policy concerns without basis in the legislative record. Toibb v. Radloff, supra.

Similarly, the other cases relied on in support of the petitioner's position do not analyze the language of the Code and Rules, but rather turn precipitously to notions of policy. The three courts of appeals which have purportedly adopted petitioner's position, have

stated that there must be a good faith statutory basis for a claim of exemption as a prerequisite for enforcing Rules 4003(b) and 9006(b)(3).[11] They would effectively rewrite Section 522(l) to read "[u]nless a party in interest objects, the property properly claimed as exempt on such list is exempt." There is nothing in the language of the Code or Rules which would support this departure from the language of the statute.

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[11] In re Peterson, 920 F.2d 1389 (8th Cir. 1990); In re Sherk, 918 F.2d 1170 (5th Cir. 1990); In re Dembs, 757 F.2d 777 (6th Cir. 1985). It should be recognized that the relevant portions of the Peterson and Dembs decisions are dicta.

B. Concerns About "Exemption By Declaration" Are Groundless.

The lower courts which ruled in this case and several other courts which have decided this issue have based their decision on concerns about "exemption by declaration". Presumably, these courts fear that if the time limitations contained in the Rules are enforced, bad faith debtors will run rampant declaring exemptions which they know have no basis.

These courts ignore three important controls on bad faith debtor behavior. First and most simply, diligent trustees will object to groundless exemptions. The more groundless the exemption, the easier the trustee's objection will be. The trustee only needs to fill out a form objection stating that the exemption has no basis in the Code and

to do so within the time limits set out by the Rules. If the exemption actually has no basis, then the objection will certainly be allowed.[12]

Second, bad faith claims of exemption are sanctionable under Bankruptcy Rule 9011. Contrary to the position stated by the petitioners in

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[12]In the case at bar, the trustee could have objected on the basis that there was no statutory grounds for the exemption or based on a concern that the manner of claiming the exemption was insufficiently definite. The trustee chose to do neither, presumably because he believed that the property right at issue had little value.

As a practical matter, trustees are appointed based on their familiarity with the Bankruptcy Code and bankruptcy practice. The notion that the trustee may be unwary or the victim of an unduly complicated statutory scheme should evoke little sympathy.

their brief, the first sentence of Rule 9011 merely states that the debtor's schedules need not be signed by the debtor's attorney. They must, however, be signed by the debtor. Fed. R. Bankr. P. 1008. The debtor is liable under Rule 9011 for improperly claimed exemptions including exemptions claimed with no basis in law or fact.[13] See 9 Collier on Bankruptcy, ¶9011.03 (15th ed. 1991).

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[13]To the extent that Rule 9011 is inapplicable to attorneys with regard to a debtor's bankruptcy schedules, important ethical considerations nevertheless preclude bad faith attorney behavior. Disciplinary Rule 7-102(A)(5) of the Canons of Ethics, for example, precludes a lawyer from knowingly making a false statement of law or fact to a court. See also DR 7-102(A)(2), (3), (7). Similarly, Rule of Professional Conduct 3.3(a)(1) precludes a lawyer from knowingly making "a false statement

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Finally, deliberate efforts to mislead the court and/or hide the true value of property can give rise to criminal sanctions. Each of the debtor's ~~schedule~~s is signed subject to the penalty for perjury. Fed R. Bankr. P. 1008. See Official Bankruptcy Form 6. Deliberate attempts to mislead the trustee and the court can give rise to a prosecution for perjury. Moreover, Section 152 of Title 18 defines

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[13]Footnote continued from previous page

of material fact or law to a tribunal." See also RPC 3.3(a)(2), (5); 4.1(a)(1), (2).

The idea that attorneys would engage in wholesale declaration of frivolous exemptions merely because Rule 9011 only arguably applies to them is somewhat ludicrous.

bankruptcy crimes and includes knowing or fraudulent concealment of property and false oaths. 18 U.S.C. §152. See, e.g., U.S. v. Tatum, 943 F.2d 370 (4th Cir. 1991) (discharge no bar to subsequent criminal prosecution for concealing assets from the trustee).

In summary, in order for a debtor to get the benefit of an exemption, a debtor must list the relevant property as exempt. It then becomes the trustee's obligation to review the claimed exemptions and to timely object to those which have no basis or if they disagree about value. Bad faith debtors run the risk of a trustee's objection as well as civil and criminal penalties.

III. THE POLICY CONCERNS FAVORING THE DEBTOR'S POSITION ARE EQUAL TO, IF NOT WEIGHTIER THAN THOSE FAVORING THE TRUSTEE AND THEY FIND GREATER SUPPORT IN THE LEGISLATIVE HISTORY.

A debtor who declares exemptions and subjects them to scrutiny by the trustee and creditors is entitled to rely on their failure to object as well as on the finality of her discharge in allowing her a fresh start. Moreover, the finality contemplated by enforcement of the time limits in the Rules is crucial to bankruptcy administration for all consumer debtors.

The key policy concern militating in favor of a strict deadline for objections to exemptions is the need for finality in the bankruptcy process. Taylor v. Freeland & Kronz, 938 F.2d

420, 425 (3rd Cir. 1991); In re Grossman, 80 B.R. 311, 315 (Bankr. E.D. Pa. 1987) (deadline for objections and finalizing of exemptions if no objection is made "serves the necessary purpose of establishing a date on which the rights of various parties can be fixed").

This Court has stated,

> the chief purpose of the bankruptcy laws is "to secure a prompt and effectual administration of the estate of all bankrupts within a limited period."

Katchen v. Landy, 382 U.S. 323, 328-329, 86 S. Ct. 467, 472, 15 L.Ed.2d 391 (1966) quoting Ex Parte Christy, 3 How. 292, 312, 44 U.S. 292, 11 L.Ed. 603 (1845).

Finality is important both from the standpoint of the debtor in obtaining a fresh start and from an administrative perspective.

The strict enforcement of a deadline for objections to exemptions is essential to the debtor in making decisions about the use and disposition of exempt property. Presumably, here, the debtor and her lawyers would never have invested significant time and money into litigating this claim, if the trustee had seasonably challenged her exemption. The trustee would have had the obligation to make the necessary expenditures to liquidate the claim.

Congress was concerned that once a debtor completes a case, he or she obtain the benefit of a "fresh start". See, e.g., H.R. Rep. No. 595, 95th Cong., 1st.

Sess. 117 (1977) (fresh start is the "essence of modern bankruptcy law"); H.R. Rep. No. 595, 95th Cong., 1st Sess. 125 (1977) (purpose of straight bankruptcy... is to obtain a fresh start"); H.R. Rep. No. 595, 95th Cong. 1st Sess. 118 (1977) (Chapter 13 designed to ensure "the debtor is given adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start") and Id. at 118 (whether debtor uses Chapter 7 or 13, "bankruptcy relief should be effective, and should provide the debtor with a fresh start.")

This Court has frequently echoed the same concern under both the Act and the Code:

> This Court has certainly acknowledged that a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S. Ct. 695, 699, 78 L.Ed. 1230 (1934).

Grogan v Garner, ___ U.S. ___, 111 S. Ct. 654, 659, 112 L.Ed.2d 755 (1991). Consistent with this goal of giving the debtor a fresh start, Congress has provided "for the exemption of certain property which would otherwise be distributed to unsecured creditors." Augustine v. United States, 675 F.2d 582, 584 (3rd Cir. 1982).

Obviously challenges to exemptions which arise as late at the one here would allow trustees to act in deus ex machina fashion to interfere with a debtor's fresh start. Such an outcome would frustrate a major objective of the Code.

The Federal Bankruptcy Rules themselves provide another reason to support debtor's position. Rule 1001 states: "[t]hese rules shall be construed to secure the just, speedy and inexpensive determination of every case and proceeding." Fed. R. Bankr. P. 1001. Citing this Court's opinion in Katchen v. Landy, 382 U.S. 323, 328, 86 S. Ct. 467, 472, 15 L.Ed.2d

391 (1966), the Advisory Committee Note goes on to say "[t]he objective of 'expeditious and economical administration' of cases under the Code has frequently been recognized by the courts to be 'a chief purpose of the bankruptcy laws.'" Fed. R. Bankr. P. 1001, Advisory Committee Note. To this end, enforcement of the provisions of Rule 9006(b)(3) are necessary to ensure "sound administration of the [bankruptcy] case". Fed. R. Bankr. P. 9006, Advisory Committee Note. The Advisory Note to prior Rule 906(b) is even more explicit in stating that enforcement of the Rules's express limitations on certain extensions of time is

designed to eliminate "disproportionate costs and delay to bankruptcy administration".[14]

A decision in favor of the trustee's position in this case would also have profound negative impact on the administration of reorganization cases. Under both Chapter 11 and 13, a plan may not be confirmed unless creditors are receiving at least what they would receive if the estate were being liquidated. 11 U.S.C. §§1129(a)(7)(A)(ii); 1325(a)(4). In the case of an individual debtor, it is impossible to determine the

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[14] See Footnote 2, supra.

liquidation value of the estate without determining the amount of the debtor's allowed exemptions. Allowing the trustee and creditors to bring late objections to a debtor's exemptions could thus wreak havoc on the finality of reorganization plans.

CONCLUSION

For all the reasons set forth above, the thoughtful and well-reasoned decision of the Third Circuit Court of Appeals in this matter should be affirmed.

Respectfully Submitted,

Gary Klein, Esquire
Counsel of Record
National Consumer Law Center
11 Beacon Street
Boston, MA 02174

Daniel L. Haller, Esquire
Neighborhood Legal Services Association
928 Penn Avenue
Pittsburgh, PA 15222

Janet E. Bostwick, Esquire
Goldstein and Manello, P.C.
265 Franklin Street
Boston, MA 02110

Attorneys for Amici Curiae